SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, ET AL., PETITIONERS,

vs.

UNITED STATES OF AMERICA

No. 309

WILLIAM SCHNEIDERMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 310

AL RICHMOND AND PHILIP MARSHALL CONNELLY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C. for the Southern District of California, Central Division	2	1
Indictment	2	1
Motion to dismiss indictment	10	6
Affidavit of Ben Margolis in support of motion to dismiss indictment on ground of vagueness	14	9
Exhibit "B"—A Comparison of the old and new indictments in the case of United States v. Schneiderman, et al.	37	14

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—59345

	Original	Print
Record from U.S.D.C. for the Southern District of California, Central Division—Continued		
Motion to dismiss indictments in cases No. 21883 and No. 21940 (omitted in printing)	43	
Affidavit of Ben Margolis in support of motion to dismiss indictments No 21883 and No. 21940	47	25
Motion for bill of particulars, excerpts from	66	32
Motion to dismiss indictment as to defendant Schneiderman as barred by res judicata	83	33
Motion to dismiss indictment as to defendants Healey, Lima, Yates, et al., as barred by res judicata	97	41
Excerpts from record in Schneiderman v. United States (320 U.S. 118) etc.	100	43
Order on motion to dismiss indictment	112	61
Order on motion for bill of particulars	113	62
Stipulation and order for transfer of documents from files in case No. 21883 to case No. 22131, excerpts from	114	63
Order on motions to dismiss indictment as barred by res judicata	167	63
Motion for judgment of acquittal	388	64
Minutes of the Court, June 9, 1952	408	72
Order striking evidence	442	74
Affidavit of William Schneiderman in support of motion for mistrial as made on June 9, 1952, etc.	508	78
Exhibit "A"—Los Angeles Examiner, June 10, 1952, article, "14 Reds Lose Acquittal Plea."	513	82
Exhibit "B"—The Mirror, Los Angeles, June 10, 1952, article, "14 Cal. Communists' Defense Opens Today in Federal Court."	514	83
Exhibit "C"—Los Angeles Herald & Express, June 10, 1952, article, "Defense Set for Reply."	515	85
Exhibit "D"—Los Angeles Times, June 10, 1952, article, "Acquittal Pleas Denied in Trial of Red Leaders."	516	85
Exhibit "E"—Daily News, Los Angeles, June 10, 1952, "14 to begin defense in Red trial."	517	86
Order to reinstate certain stricken testimony	574	88
Order striking evidence	581	88
Minutes of the Court, July 30, 1952	630	91
Minutes of the Court, July 31, 1952	632	93
Minutes of the Court, August 5, 1952	634	96
Minutes of the Court, August 6, 1952	649	97
Motion in arrest of judgment	650	99
Motion for new trial	653	100
Minutes of the Court, August 7, 1952	657	102

	Original	Print
Proceedings in U.S.C.A. for the Ninth Circuit	765	104
Minute entries of argument and submission (omitted in printing)	765	104
Minute entry of order directing filing of opinion and filing and recording of judgment	767	104
Opinion, Fee, J.	768	105
Judgment	802	140
Minute entry of order denying petition for rehearing	803	140
Clerk's certificate (omitted in printing)	804	
Order extending time to file petition for writ of certiorari	805	141
Orders allowing certiorari	807	141

[fols. 1-2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

February, 1951, Grand Jury

No. 22131-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM SCHNEIDERMAN, DOROTHY ROSENBLUM HEALEY, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as Abraham Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson, also known as Solomon Szkolnick, and Ben Dobbs, also known as Benjamin Isgur, Defendants

INDICTMENT—Filed December 21, 1951

(U. S. C., Title 18, Sec. 10 (1946 Ed.); U. S. C., Title 18, Sec. 2385 (1948 Ed.); U. S. C., Title 18, Sec. 11 (1946 Ed.); U. S. C., Title 18, Sec. 371 (1948 Ed.)—Conspiracy to advocate the overthrow of the Government by force and violence.)

The grand jury charges:

(1) From on or about June 28, 1940, and continuously thereafter to and including the date of the filing of this indictment, in the Southern District of California, in the State of California, in the State of New York, and in other places to the grand jury unknown, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as [fol. 3] Abraham Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus

Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson, also known as Solomon Szkolnick, and Ben Dobbs, also known as Benjamin Isgur, the defendants herein, wilfully and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act (54 Stat. 671), U. S. C., Title 18, Sec. 10 (1946 Ed.), and U. S. C., Title 18, Sec. 2385 (1948 Ed.), in violation of U. S. C., Title 18, Sec. 11 (1946 Ed.), being Section 3 of the said Smith Act while said section of said act remained effective, and thereafter in violation of U. S. C., Title 18, Sec. 371 (1948 Ed.), by (1) wilfully and knowingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence, with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and by (2) wilfully and knowingly organizing, and helping to organize, as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, with the intent of causing the aforesaid overthrow and destruc-[fol. 4] tion of the Government of the United States by force and violence as speedily as circumstances would permit;

(2) It was a part of said conspiracy that the conspirators would become members, officers, or functionaries of said Communist Party, knowing the purposes of the said Communist Party, and in such capacities would assume leadership in said Communist Party and responsibility for carrying out its policies and activities to and including the date of the filing of this indictment;

(3) It was further a part of said conspiracy that said defendants and co-conspirators would cause to be organized groups, clubs, sections, and district, state, and national

units of said party in the State of California, in the State of New York, and other places to the grand jury unknown, and would recruit, and encourage recruitment of, members to said party, concentrating on recruiting persons employed in key basic industries and plants;

(4) It was further a part of said conspiracy that said defendants and co-conspirators would publish and circulate, and cause to be published and circulated, books, articles, magazines, and newspapers teaching and advocating the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit;

(5) It was further a part of said conspiracy that said defendants and co-conspirators would write, and cause to be written, articles and directives in publications of the Communist Party of the United States of America includ-
[fol. 5] ing, but not limited to, "Political Affairs," "Daily People's World," "Daily Worker," and "The Worker," teaching and advocating the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit;

(6) It was further a part of said conspiracy that said defendants and co-conspirators would conduct, and cause to be conducted, schools and classes in which recruits and members of said Communist Party would be indoctrinated in the principles of Marxism-Leninism and in which the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit would be taught and advocated;

(7) It was further a part of said conspiracy that said defendants and co-conspirators would agree upon, and carry into effect, detailed plans for the vital parts of the Communist Party of the United States of America to go underground, in the event of emergency, and from said underground position to continue in all respects the conspiracy described in paragraph (1) of this indictment;

(8) It was further a part of said conspiracy that said defendants and co-conspirators would use false names and false documents in order to conceal their identities and

activities as members and functionaries of said party; and

In furtherance of said conspiracy and to effect the objects thereof, the defendants and co-conspirators did commit, among others, the following:

[fol. 6] Overt Acts

1. On or about January 31, 1941, William Schneiderman, a defendant herein, did attend and participate in a meeting held at the Danish Hall, 164 Eleventh Street, Oakland, California.

2. On or about May 12, 1942, William Schneiderman, a defendant herein, did attend and participate in a meeting held at the Serbian Hall, 225 Valencia Street, San Francisco, California.

3. On or about June 27, 1943, William Schneiderman, Oleta O'Connor Yates, Albert Jason Lima, Carl Rude Lambert, and Henry Steinberg, defendants herein, did attend and participate in a convention of the Communist Party of the State of California, held at 121 Haight Street, San Francisco, California.

4. On or about October 17, 1943, William Schneiderman, Oleta O'Connor Yates and Carl Rude Lambert, defendants herein, did attend and participate in a convention of the Communist Party for Alameda County, held at 2229 Telegraph Avenue, Oakland, California.

5. On or about May, 1944, William Schneiderman and Oleta O'Connor Yates, defendants herein, did attend a National Convention of the Communist Party of the United States, held at the Riverside Plaza Hotel, New York City.

6. On or about May, 1945, William Schneiderman, Dorothy Rosenblum Healey, Oleta O'Connor Yates, Albert Jason Lima and Ernest Otto Fox, also known as Ernest Otto Fuchs, defendants herein, did attend and participate in a meeting held at the Danish Auditorium, 1359 W. 24th Street, Los Angeles, California.

7. On or about July 26, 27, and 28, 1945, William Schneiderman, Loretta Starvus Stack and Albert Jason [fol. 7] Lima, defendants herein, did attend a National convention of the Communist Party of the United States, held in New York City.

8. On or about August 18 and 19, 1945, William Schneiderman, Carl Rude Lambert, Loretta Starvus Stack, Al Richmond, also known as Abraham Richmond, Albert Jason Lima, and Frank Carlson, also known as Solomon Szkolnick, did attend and participate in a convention of the Northern Section of the Communist Party of the State of California, held at 1621 Market Street, San Francisco, California.

9. On or abouf July 17 and 18, 1948, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Al Richmond, also known as Abraham Richman, Loretta Starvus Stack, and Mary Bernadette Doyle, defendants herein, did attend and participate in a convention of the Communist Party of the State of California held at Park Manor, Sixth Street and Western Avenue, Los Angeles, California;

10. On or about August 20, 1948, Mary Bernadette Doyle, a defendant herein, did attend and participate in a meeting of the Morgan Hull Club in San Diego, California;

11. On or about August 21, 1948, Loretta Starvus Stack, a defendant herein, did prepare and issue a directive and cause it to be circulated by the California State Committee of the Communist Party;

12. On or about August 21, 1948, Al Richmond, also known as Abraham Richman, a defendant herein, did issue a direc- [fol. 8] tive and cause it to be circulated by the California State Committee of the Communist Party;

13. On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting;

14. On or about May 20, 1949, Rose Chernin Kusnitz, a defendant herein, did attend and participate in a meeting held at 847 South Grand Avenue, Los Angeles, California;

15. On or about December 7, 1949, William Schneiderman and Dorothy Rosenblum Healey, defendants herein, did attend and participate in a meeting at Park View Manor, 2200 West Seventh Street, Los Angeles, California;

16. On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California.

17. On or about February 15, 1950, Mary Bernadette Doyle, a defendant herein, did attend and participate in a

meeting held at 7891 Normandie Street, San Diego, California;

18. On or about April 6, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at 3875 City Terrace Boulevard, Los Angeles, California;

19. On or about June 12, 1950, Albert Jason Lima, a defendant herein, did attend and participate in a meeting at 2200 West Seventh Street, Los Angeles, California;

20. On or about June 24, 1950, Philip Marshall Connelly, [fol. 9] Mary Bernadette Doyle, and Albert Jason Lima, defendants herein did attend and participate in a meeting at Park Manor, 607 South Western Avenue, Los Angeles, California;

21. On or about November, 1950, Ernest Otto Fox, also known as Ernest Otto Fuchs, a defendant herein, did prepare and issue a directive and cause it to be circulated;

22. On or about April 9, 1951, Carl Rude Lambert, a defendant herein, did attend and participate in a meeting at 405 De La Guerra Street, Santa Barbara, California;

23. On or about July 24, 1951, Oleta O'Connor Yates, a defendant herein, did attend and participate in a meeting at 124 West Sixth Street, Los Angeles, California.

A True Bill.

Robert B. Young III, Foreman.

Walter S. Binns, United States Attorney.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

No. 22131 CD

[Title Omitted]

MOTION TO DISMISS INDICTMENT—Filed January 3, 1952

To the United States of America, Plaintiff, and to Walter S. Binns, United States Attorney, Its Attorney:

Please take notice that the defendants William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall

Connelly, Rose Chernin Kusnitz, Al Richmond, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson, and Ben Dobbs, move the Court for an order dismissing the indictment herein upon the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment was not found within three years next after the alleged offense was committed.

3. The indictment, and the Smith Act, 18 U.S.C. Section 2385, and the general conspiracy statute, 18 U.S.C. Section 371, as construed and applied by the indictment, violate the [fol. 11] rights of these defendants under the Constitution of the United States in the folling particulars:

a. They abridge these defendants' freedom of speech and of the press, and their right peaceably to assemble and to petition the Government for redress of grievances, all in violation of the First Amendment.

b. They deprive these defendants of their liberty without due process of law in violation of the due process clause of the Fifth Amendment.

c. By reason of their vagueness, they deprive these defendants of their liberty without due process of law and abridge their rights of freedom of speech, freedom of press, freedom of assembly and the right to petition the Government for redress of *b*rievances, in violation of the First and Fifth Amendments.

d. The indictment, by reason of its vagueness and of the vagueness of the statutes on which it is based, and by reason of its failure to set forth all the necessary elements of the crime it purports to charge, deprives these defendants of their right, in a criminal prosecution, to be informed of the nature and cause of the accusation, in violation of the Sixth Amendment.

e. The indictment and the statutes on which it is based as construed and applied by the indictment, purport to exercise powers not delegated by the Constitution to the Government of the United States, but reserved to the people thereof by the Ninth and Tenth Amendments.

f. The statutes as construed and applied by the indictment constitute bills of attainder in violation of Article I, Section 9, Clause 3 of the Constitution.

4. The indictment purports to charge a conspiracy to violate the Smith Act, 18 U.S.C., Section 2385, which Act is [fol. 12] unconstitutional and void on its face in the following particulars:

a. It abridges freedom of speech and of the press, and the right of the people peaceably to assemble, and to petition the Government for a redress of grievances, all in violation of the First Amendment to the Constitution of the United States.

b. It deprives the defendants of liberty without due process of law, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

c. It abridges freedom of speech and of the press, and the right of the people peaceably to assemble, and to petition the Government for a redress of grievances, and deprives the defendants of liberty without due process of law, all by reason of its vagueness and in violation of the First and Fifth Amendments to the Constitution of the United States.

d. It purports to exercise powers not delegated to the United States by the Constitution, but reserved thereby to the people of the United States, in violation of the Ninth and Tenth Amendments to the Constitution.

e. The statute as construed and applied by the indictment constitutes a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution.

This motion is and will be based on Rule 12 of the Federal Rules of Criminal Procedure and all other applicable statutory and constitutional provisions, the affidavit of Ben Margolis, Esq., verified the 17th day of September, 1951, heretofore filed in the office of the Clerk in this Court, in support of the motion to dismiss the indictments in *United States of America v. Schneiderman, et al*, No. 21883 CD, and *United States of America v. Spector, et al*, No. 21940

CD, the affidavit of Ben Margolis, Esq., verified the 3rd [fol. 13] day of January, 1952, in support of this motion to dismiss on ground of vagueness, the memorandum of points and authorities in support of this motion, and upon all the records, files and proceedings heretofore had herein.

Leo Branton, Jr., Attorney for defendants Henry Steinberg, Ben Dobbs. Norman Leonard, Attorney for defendants Loretta Starvus Stack, Ernest Otto Fox, Frank Carlson. Ben Margolis, Attorney for defendants William Schneiderman, Oleta O'Connor Yates, Mary Bernadette Doyle. Alexander H. Schullman, Attorney for defendants Dorothy Rosenblum Healey, Philip Marshall Connelly. Leo A. Sullivan, Attorney for defendants Albert Jason Lima, Carl Rude Lambert. A. L. Wirin, Attorney for defendants Rose Chernin Kusnitz, Al Richmond, Frank Spector.

[fol. 14] No. 22131 CD

[Title Omitted]

AFFIDAVIT OF BEN MARGOLIS IN SUPPORT OF MOTION TO DISMISS INDICTMENT ON GROUND OF VAGUENESS

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Ben Margolis, being first duly sworn, deposes and says:

I am one of the attorneys for the defendants on the motion herein to dismiss the indictment and I make this affidavit on behalf of all the defendants in support of said motion to dismiss.

In connection with that part of the motion which challenges the validity of the indictment by reason of its vagueness and indefiniteness, I hereby submit and allege certain facts of record which the Court is also respectfully requested to judicially notice, and which bear importantly on the issue here involved.

The original indictments returned against these defendants in July and August, 1951, alleged specifically that "From and on or about April 1, 1945, and continuously

thereafter up to and including the date of the filing of this indictment, in the Southern District of California, and elsewhere, . . . the defendants herein, unlawfully, wil- [fol. 15] fully, and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act . . ."

On December 11, 1951, this Court dismissed the indictments upon motion of the defendants upon the principal ground that the said indictments failed to allege a specific unlawful intent required by the provisions of the law and the interpretation given the law by the United States Supreme Court. On or about December 21, 1951, the present indictment was returned against these same defendants. The new indictment alleges that "From on or about June 28, 1940 and continuously thereafter to and including the date of the filing of this indictment, . . . the defendants herein, wilfully and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act . . ."

It will thus be noted that a material portion of the specific charge laid in the indictment has been varied as to date although the same defendants and the same co-conspirators are set forth in both indictments. The Government now has pleaded a fact in the indictment, dealing with an essential element of the offense, namely the date when the alleged conspiracy was formed, which is wholly inconsistent with the Government's theory as advanced in the prosecution in *United States v. Dennis, et al,* where the alleged co-conspirators were charged with forming the conspiracy in [fol. 16] April 1945 and with the theory of the Government in this prosecution which it has advanced throughout the

bail proceedings and all prior proceedings and in fact continues to press up to this very date. The result is to make it impossible for the defendants or their counsel to understand the true nature and cause of the accusation against them and to deprive them of their right to plead any judgment of acquittal which may be obtained in this case as a bar to any subsequent prosecution for the same offense. In its entirety, therefore, the indictment herein, because of its vagueness, indefiniteness and uncertainty, fails to advise the defendants of the nature of the charge which they have to meet; does not give them a fair opportunity to prepare their defense; and makes it impossible for this Court to determine whether or not the facts stated in the indictment are sufficient to support a conviction, all in violation of rights guaranteed to the defendants by the Sixth Amendment to the Constitution of the United States.

In further amplification I respectfully direct the attention of the Court to the opening statement on behalf of the Government in the trial of *United States v. Dennis, et al* (Joint Appendix, United States Court of Appeals, Vol. IV, pp. 3206-3224). In the course of that opening statement, the attorney for the United States stated:

> "At this Convention in July, 1945, these (T-1117) defendants said that they were reconstituting the Communist Party; that is, that they were setting up anew, something which, while not then existing in July 1945, had existed before. To do this, they dissolved the Communist Political Association and immediately reorganized as the Communist Party of the United States of America. By this act they made a deliberate choice between organizations which they declared were funda- [fol. 17] mentally different. In order to show that difference, and to show the nature and the choice, or the nature of the choice, rather, which these defendants then in 1945 deliberately made, it is necessary to go back beyond the holding of that Convention of 1945.
>
> "The Communist Party, which the defendants said they were reconstituting, had indeed previously existed. The Communists in this country, first established their party here shortly after the successful

Communist Revolution in Russia at the end of the first World War.

"The party adopted various names during its early days, but eventually it became the Communist Party of the United States of America, and so remained until its dissolution in 1944. At various times prior to that time, all of these defendants were members, and some of them were officers of that Communist Party.

"They dissolved that party, however, in 1944, (T-1118) and established in its stead the Communist Political Association, of which they also became members.

"This change was much more than a mere change in name from the Communist Party to the Communist Political Association. It was something fundamental. These defendants said that it was an abandonment by Communists in the United States of the objectives, the doctrines and the program which they advocated ever since their founding." (pp. 3209-10)

[fol. 18] It will be observed from the above quotation and from a complete examination of the prosecutor's opening statement, as well as a reading of the essential portions of the record, that the theory of the Government has been that the Communist Party and its program were abandoned in 1944; that at that time a fundamental change took place in the formation of the Communist Political Association; and that it was not until April 1945 and thereafter, when the Communist Political Association was dissolved and the Communist Party organized, that a conspiracy to organize and teach and advocate proscribed doctrines in violation of the Smith Act was formed.

This theory of the Government was pursued before the Court of Appeals (*United States* v. *Dennis*, 183 Fed. 2d 201) and before the United States Supreme Court (*Dennis* v. *United States*, 341 U. S. 494). Indeed, in the decision of the Supreme Court, Judge Vinson states in a footnote on page 498:

"Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this

Association was one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period."

In addition, in the prior proceedings against these defendants, the attorneys for the Government constantly argued that the defendants here were engaged in the same conspiracy which was found to exist in the *Dennis* case. Thus, in a memorandum submitted to the United States Supreme Court in *Stack, et al.* v. *Boyle*, the solicitor-general stated: "In applying Rule 46(c), we believe that a court should not ignore, as petitioners contend it should, the fact that these petitioners are charged with active and leading roles in the same Communist conspiracy which was found [fols. 19-36] to exist in *Dennis* v. *United States*, 341 U. S. 494, . . ." (Memorandum for Respondent in Reply to Petitioners' Motion of October 24, 1951, page 10, November 1951).

In the recent memorandum submitted by the Government in opposition to the motion to inspect documents, entitled in the new proceeding, the attorney for the United States stated (page 6): "In considering this question and other motions of the defense where they have sought a discovery of virtually the Government's entire case, we first wish to remind this Court that this case is one in which the evidence will be strikingly similar to the so-called Dennis case tried in New York. The defense has access to the twenty printed volumes of the record on appeal of the *Dennis* case. That surely *precludes* any great surprise upon the part of the Government."

From all of the aforesaid, the defendants are placed in the position where they cannot understand the nature and cause of the accusation made against them. It is impossible to determine whether the charge against the defendants is the formation of a conspiracy on the date when the Smith Act became effective or the formation of a conspiracy for the first time in April 1945 to commit offenses prohibited by the Smith Act. In view of the vagueness and indefiniteness of the indictment in these respects, it is respectfully submitted that the indictment is inherently defective and

should be dismissed in accordance with the aforesaid statutory and constitutional requirements.

Ben Margolis.

Subscribed and sworn to before me this 3rd day of January, 1951. Mary L. Rosenfield, Notary Public in and for Said County and State. My commission expires January 15, 1955.

[fol. 37] EXHIBIT "B" TO MOTION

A Comparison of the Old and New Indictments in the case of UNITED STATES v. SCHNEIDERMAN, et al.

Old indictment:	*New indictment:*
The Grand Jury charges:	The grand jury charges:
(1) From *and* on or about *April 1, 1945*, and continuously thereafter *up* to and including the date of the filing of this indictment, in the Southern District of California, and *elsewhere*, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as Abraham Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus Stack, and Mary Bernadette Doyle, the defendants herein, *unlawfully*, wilfully and knowingly did conspire with each other and with William Z.	(1) From on or about *June 28, 1940*, and continuously thereafter and including the date of the filing of this indictment, in the Southern District of California, *in the State of California, in the State of New York, and in other places to the grand jury unknown*, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as Abraahm Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, *Frank Efroim Spector*,

Old indictment:

Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) 10, and 18 U.S.C. (1948 Ed.) 2385, *by so conspiring* (1) *unlawfully,* wilfully and knowingly to advocate and teach the duty and necesssity of overthrowing the Government of the United States by Force and violence, and (2) *unlawfully,* wilfully, and knowingly to organize and help organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) 11, and 18 U.S.C. (1948 Ed.) 371;

[fol. 38] (Note: There is also a difference, not in-

New indictment:

Frank Carlson, also known as Solomon Szkolnick, and Ben Dobbs, also known as Benjamin Isgur, the defendants herein, wilfully and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act (54 Stat. 671), U.S.C., Title 18, Sec. 10 (1946 Ed.), and U.S.C., Title 18, Sec. 2385 (1948 Ed.), in violation of U.S.C., Title 18, Sec. 11 (1946 Ed.), being Section 3 of the said Smith Act *while said section of said act remained effective, and thereafter* in violation of U.S.C. Title 18, Sec. 371 (1948 Ed.), by (1) wilfully and knowingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence, *with the intent of causing the aforesaid overthrow and*

Old indictment:

dicated by underlining, in the way in which sections of the Smith Act are referred to; however, the same sections are mentioned in both indictments.)

(2) It was part of said conspiracy that *said defendants and co*-conspirators would become members, officers, *and* functionaries of said Party, knowing the purposes of the Party, and in such capacities would assume leadership in said party and responsibility for carrying out its policies and activities *up* to and including the date of the filing of this indictment;

(3) It was further part of said conspiracy that said defendants and co-conspir-

New indictment:

destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and by (2) wilfully and knowingly organizing, and helping to organize, as [fol. 38] the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, *with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit;*

(2) It was *a* part of said conspiracy that *the* conspirators would become members, officers, *or* functionaries of said *Communist* Party, knowing the purposes of the *said Communist* Party, and in such capacities would assume leadership in said *Communist* Party and responsibility for carrying out its policies and activities to and including the date of the filing of this indictment;

(3) It was further a part of said conspiracy that said defendants and co-conspir-

Old indictment:

ators would cause to be organized Groups, Clubs, Sections, District and State Units of said Party in the State of California *and elsewhere* and would recruit and encourage recruitment of members *of* said Party, concentrating on recruiting persons employed in key basic industries and plants;

(4) It was further a part of said conspiracy that said defendants and co-conspirators would publish and circulate and cause to be published and circulated books, articles, magazines, and newspapers teaching and advocating the duty and necessity of overthrowing and destroying the Government of the United States by force and violence;

(5) It was further a part of said conspiracy that said defendants and co-conspirators would write and cause to be written articles and directives in publications of the Communist Party of the United States of America, including, but not limited to "Political Affairs," "Daily People's World," "Daily Worker," and "The Work-

New inlictment:

ators would cause to be organized groups, clubs, sections, and district, state *and national* units of said party in the State of California, *in the State of New York, and other places to the grand jury unknown,* and would recruit, and encourage recruitment of, members *to* said party, concentrating on recruiting. persons employed in key basic industries and plants;

(4)

(identical—with following adidtion:)

as speedily as circumstances would permit;

(5)

(identical—through portion appearing on this page)

[fol. 39] advocating the *duty and* necessity of overthrow-

Old indictment:

er," teaching and advocating the necessity of overthrowing the government of the United States by force and violence;

(6) It was further a part of said conspiracy that said defendants would conduct and cause to be conducted schools and classes *for indoctrination of recruits and members of said Party* in the principles of Marxism-Leninism in which would be taught and advocated the duty and necessity of overthrowing the Government of the United States by force and violence as speedily as circumstances permit;

(7) It was further a part of said conspiracy that said defendants and co-conspirators would agree upon and carry into effect detailed plans for the vital parts of the Communist Party of the United States of America to go underground in the event of emergency and from said underground position to continue in all respects the conspiracy described in paragraph (1);

(8) It was further a part of said conspiracy that said defendants and co-conspira-

New inlictment:

ing *and destroying* the Government of the United States by force and violence *as speedily as circumstances would permit;*

(6) It was further a part of said conspiracy that said defendants *and co-conspirators* would conduct, and cause to be conducted, schools and classes *in which recruits and members of said Communist Party would be indoctrinated* in the principles of Marxism-Leninism and in which the duty and necessity of overthrowing *and destroying* the Government of the United States by force and violence as speedily as circumstances *would* permit would be taught and advocated;

(7)

(identical—with following addition:)

of this indictment;

(8) It was further a part of said conspiracy that said defendants and co-conspira-

Old indictment:

tors would use false names, *passports,* and *other* false documents in order to conceal their identities and activities as members and functionaries of said Party;

(9) It was further a part of said conspiracy that defendants and co-conspirators would do other and further things to conceal the existence and operations of said conspiracy; and

In *pursuance* of said conspiracy and to effect the objects thereof *in the Southern District of California,* the defendants and co-conspirators, did commit, among others, the following:

[fol. 40] Overt Acts

(No corresponding allegation.)

(No corresponding allegation.)

New indictment:

tors would use false names and false documents in order to conceal their identities and activities as members and functionaries of said party; and

(No corresponding allegation.)

In *furtherance* of said conspiracy and to effect the objects thereof, the defendants and co-conspirators did commit, among others, the following:

Overt Acts

1. On or about January 31, 1941, William Schneiderman, a defendant herein, did attend and participate in a meeting held at the Danish Hall, 164 Eleventh Street, Oakland, California.

2. On or about May 12, 1942, William Schneiderman, a defendant herein, did attend and participate in a meeting held at the Serbian Hall, 225 Valencia Street, San Francisco, California.

Old indictment:	*New inlictment:*
(No corresponding allegation.)	3. On or about June 27, 1943, William Schneiderman, Oleta O'Connor Yates, Albert Jason Lima, Carl Rude Lambert, and Henry Steinberg, defendants herein, did attend and participate in a convention of the Communist Party of the State of California, held at 121 Haight Street, San Francisco, California.
(No corresponding allegation.)	4. On or about October 17, 1943, William Schneiderman, Oleta O'Connor Yates and Carl Rude Lambert, defendants herein, did attend and participate in a convention of the Communist Party for Alameda County, held at 2229 Telegraph Avenue, Oakland, California.
(No corresponding allegation.)	5. On or about May, 1944, William Schneiderman and Oleta O'Connor Yates, defendants herein, did attend a National Convention of the Communist Party of the United States, held at the Riverside Plaza Hotel, New York City.
(No corresponding allegation.)	6. On or about May, 1945, Wiliiam Schneiderman, Dorothy Rosenblum Healey, Oleta O'Connor Yates, Albert Jason Lima and Ernest Otto Fox, also known as Ernest Otto Fuchs, defend-

Old indictment.	*New indictment:*
	ants herein, did attend and participate in a meeting held at the Danish Auditorium, 1359 W. 24th Street, Los Angeles, California.
(No corresponding allegation.)	7. On or about July 26, 27, and 28, 1945, William Schneiderman, Loretta Starvus Stack and Albert Jason Lima, defendants herein, did attend a National convention of the Communist Party of the United States, held in New York City.
[fol. 41] (No corresponding allegation.)	
	8. On or about August 18 and 19, 1945, William Schneiderman, Carl Rude Lambert, Loretta Starvus Stack, Al Richmond, also known as Abraham Richman, Albert Jason Lima, and Frank Carlson, also known as Solomon Szkolnick, did attend and participate in a convention of the Northern Section of the Communist Party of the State of California, held at 1621 Market Street, San Francisco, California.
1.	9. On or about July 17 and 18, 1948, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Al Richmond, also known as Abraham

Old indictment:

New indictment:

Richman, Loretta Starvus Stack, and Mary Bernadette Doyle, defendants herein, did attend and participate in a convention of the Communist Party of the State of California *held* at Park Manor, Sixth Street and Western Avenue, Los Angeles, California.

2. 10. On or about August 20, 1948, Mary Bernadette Doyle, a defendant herein, did attend and participate in a meeting of the Morgan Hull Club in San Diego, California.

3. 11. On or about August 21, 1948, Loretta Starvus Stack, a defendant herein, did prepare and issue a directive and cause it to be circulated by the California State Committee of the Communist Party.

4. 12. On or about August 21, 1948, Al Richmond, also known as Abraham Richman, a defendant herein, did issue a directive and cause it to be circulated by the California State Committee of the Communist Party.

5. 13. On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting.

6. 14. On or about May 20, 1949, Rose Chernin Kusnitz,

Old indictment:

New indictment:

a defendant herein, did attend and participate in a meeting held at 847 South Grand Avenue, Los Angeles, California.

7.

15. On or about December 7, 1949, William Schneiderman and Dorothy Rosenblum Healey, defendants herein, did attend and participate in a meeting at Park View Manor, 2200 West Seventh Street, Los Angeles, California.

[fols. 42-46] 8.

16. On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California.

9.

17. On or about February 15, 1950, Mary Bernadette Doyle, a defendant herein, did attend and participate in a meeting held at 7891 Normandie Street, San Diego, California.

10.

18. On or about April 6, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at 3875 City Terrace Boulevard, Los Angeles, California.

11.

19. On or about June 12, 1950, Albert Jason Lima, a defendant herein, did attend and participate in a meeting

Old indictment:	*New indictment:*
	at 2200 West Seventh Street, Los Angeles, California.
12.	20. On or about June 24, 1950, Philip Marshall Connelly, Mary Bernardette Doyle, and Albert Jason Lima, defendants herein, did attend and participate in a meeting at Park Manor, 607 South Western Avenue, Los Angeles, California.
13.	21. On or about November, 1950, Ernest Otto Fox, also known as Ernest Otto Fuchs, a defendant herein, did prepare and issue a directive and cause it to be circulated.
14.	22. On or about April 9, 1951, Carl Rude Lambert, a defendant herein, did attend and participate in a meeting at 405 De La Guerra Street, Santa Barbara, California.
15.	23. On or about July 24, 1951, Oleta O'Connor Yates, a defendant herein, did attend and participate in a meeting at 124 West Sixth Street, Los Angeles, California.
	(Note: No overt acts were alleged with respect to Spector and Dobbs.)
A True Bill. Robert B. Young, Foreman.	A True Bill. ——, Foreman.
Ernest A. Tolin, United	Walter S. Binns, United

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

No. 21883 CD
No. 21940 CD

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENTS—

Filed September 18, 1951

[fol. 48] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Ben Margolis, being first duly sworn, deposes and says:

I am one of the attorneys for the defendants on the motion herein to dismiss the indictments and I make this affidavit on behalf of all the defendants in support of the said motion to dismiss the indictments in the above entitled causes.

In connection with that portion of the motion here which charges that the indictments were not found within three years next after the alleged offenses were committed, I hereby submit the following facts of record as to the date of the organization of the Communist Party of the United States of America, and in addition respectfully request the Court to take judicial notice of the said facts of record in connection with the motion herein:

1. In the indictment herein, William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall are named as co-conspirators but not defendants. On July 20, 1948 the aforesaid persons were indicted in the Southern District of New York, charged with a conspiracy to violate the Smith Act, 18 U. S. C. Section 2385 (*United States of America v. Dennis, et al.*, Joint Appendix filed in the United States Court of Appeals for the Second Circuit, Vol. 1, p. 7).

2. It was alleged in the aforesaid indictment, among other things, that:

"2. It was part of said conspiracy that said defendants would convene, in the Southern District of New [illegible] of the National Board of the Com-

munist Political Association on or about June 2, 1945, [fol. 49] to adopt a draft resolution for the purpose of bringing about the dissolution of the Communist Political Association, and for the purpose of organizing as the Communist Party of the United States of America a society, group, and assembly of persons dedicated to the Marxist-Leninist principles of the overthrow and destruction of the Government of the United States by force and violence.

"3. It was further a part of said conspiracy that said defendants would thereafter convene, in the Southern District of New York, a meeting of the National Committee of the Communist Political Association on or about June 18, 1945, to amend and adopt said draft resolution.

"4. It was further a part of said conspiracy that said defendants would thereafter cause to be convened, in the Southern District of New York, a special National Convention of the Communist Political Association on or about July 26, 1945, for the purpose of considering and acting upon said resolution as amended.

"5. It was further a part of said conspiracy that said defendants would induce the delegates to said National Convention to dissolve the Communist Political Association.

"6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence; and [fol. 50] would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism."—*United States v. Foster*, 9 F. R. D. 367, 375 (D. C. N. Y., 1949)

3. In the opening statement to the jury at the trial under the indictment above mentioned, on behalf of the United States of America the United States Attorney, John F. X. McGohey, stated:

"The remaining nine paragraphs of the indictment set forth the details of the indictment. Briefly, these

paragraphs charge that these defendants brought about meetings in New York City in June and July of 1945 of the National Committee and the National Board and the National Convention of the Communist Political Association, in order to dissolve the Association and to organize in its stead the Communist Party of the United States of America. They charged that it was a part of the conspiracy that these defendants would assume leadership of the Communist Party of the United States of America; it is further charged that the defendants would organize clubs, district and state units of their party; that they would recruit new members of their party, and that they, the defendants, would publish books, magazines and newspapers; that they would organize schools and classes, in all of which it was planned that there would be taught and advocated the Marxist-Leninist principles of the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

"Now, that is what we charge. To support that [fol. 51] charge we propose to prove by witnesses on that stand, and documents which they will introduce, just what these defendants caused others under their supervision and control to do, and to say what the defendants actually did at that Convention in July, 1945, according to their own statements was to reconstitute the Communist Party of the United States of America; to educate the working class in the course of its day-to-day struggles, for its historic mission, the establishment of Socialism. They based the party upon the principles of Marxism-Leninism."—*United States of America v. Dennis, et al.*, Joint Appendix filed in the United States Circuit Court of Appeals for the Second Circuit, Vol. 4, p. 3208.

4. In the opening statements to the jury on behalf of defendants, one of the defendants in the aforementioned trial, Eugene Dennis, stated:

"The defense will prove that these decisions were democratically discussed by the members of the Com-

munist Party and ratified by the delegates to our July 1945 National Convention.

* * * * * * *

"Ladies and gentlemen of the jury, in July and June 1945 when we defendants allegedly met, according to the prosecution, to teach and to advocate force and violence, our concern, we will really show, was totally different from what is charged by the prosecution. We will establish that at these meetings, to which the indictment refers, we Communists paid tribute not only to the Americans who had died in World War II but to [fol. 52] the anti-Fascists of all lands and to the victims of Fascist force and violence who at that very time were being liberated from the Nazi concentration camps. We will establish from authentic documents adopted at our 1945 National Convention that we Communist leaders in our party pledged ourselves to do all in our power to save our people and our country from the consequences of an American Reichstag fire trial and an American version of the Japanese system of punishing those alleged to hold dangerous thoughts. The prosecution asks this jury for what amounts to a preventative conviction, in order that we Communist leaders may be put under what the Nazis called protective custody. I ask the jury to weigh the prosecution's case against the proof we defendants will offer to establish that we have taught and advocated the duty and necessity to prevent the force and violence of Fascism, imperialists of war and lynching and anti-semitism. I ask you to weigh carefully our sincere offer of proof which demonstrates that we Communists are second to none in our devotion to our people and to our country, and that we teach and advocate and practice a program of peace, of democracy, equality, economic security and social progress."—*United States of America v. Dennis, et al.*, Joint Appendix filed in the United States Circuit Court of Appeals for the Second Circuit, Vol. 4, pp. 3227, 3249.

5. In the opening statement to the jury made by counsel for the defendants Williamson and Green in the aforemen- [fol. 53] tioned trial, the following statement was made:

"They are on trial, as Mr. McGohey indicated, because the Communist Party adopted certain principles, the principles of Marxism-Leninism, or reconstituted itself in the year 1945. Now Mr. McGohey says that these principles were contained in some books. He mentioned four of the books. But, as this trial develops, you will learn, as you will have to, that the principles of Marxism-Leninism are found, not in four books, not even in a hundred books, but in hundreds of books that have been written well over a period of a hundred years."—*United States of America v. Dennis, et al.*, Joint Appendix filed in the United States Circuit Court of Appeals for the Second Circuit, Vol. 4, p. 3287.

6. In the aforementioned trial the government offered as a witness in its behalf Louis Francis Budenz, and the said witness testified as follows:

"By Mr. McGohey:

"Q. Now Mr. Budenz, after this meeting of the National Committee was there a National Convention of the Communist Political Association held? A. Yes, sir, there was.

"Q. And will you tell us where it was held and when? A. It was held beginning July 26th at Fraternal Club House.

"Q. July 26th in what year? A. 1945.

"Q. And at Fraternal Club House? A. In New York City.

"Q. Do you know whereabouts in New York City that is? A. It is in the 40s, yes, sir.

[fol. 54] "Q. You are not positive of the address, are you? A. No, sir. I have been there many times but I am not positive of the address at the moment.

"(Short recess.)

"By Mr. McGohey:

"Q. Mr. Budenz, just before the recess you had told us that the Convention of the Communist Political Association was held in New York City commencing on July 26, did you not? A. Yes, sir.

"Q. Did you attend that convention? A. Irregularly. I was there very infrequently because I was mostly at the Daily Worker.

"Q. And during that period were you reporting or causing to be published in the Daily Worker the proceedings, the occurrences at the Convention? A. Yes, sir.

"Q. But you were physically present from time to time at the Convention, were you not? A. I went in to the Convention for short periods now and then.

"Mr. Gladstein: I didn't hear the balance of the answer.

"(Answer read.)

"Q. Do you know whether there was a section reserved for the press at that Convention? A. No, sir, there was not.

"Q. Do you know whether any representatives of the general public press were admitted to that Convention? A. They were prohibited.

"Q. Now what did that convention do? A. That convention re-established the Communist Political Association.

[fol. 55] "Q. It re-established it?

"The Court: It what?

"The Witness: It established the—abolished the Communist Political Association.

"Q. I am talking of the Convention of July 1945, Mr. Budenz. A. It abolished the Communist Political Association and re-established the Communist Party. That was a verbal slip. Re-established the Communist Party of the United States and wrote a Constitution for that Party.

"Q. And did it elect, without describing who it

elected, if any,—did it elect officers of the new Communist Party? A. Yes, sir, it did.

"By the Court:

"Q. That same body of people did both those things? A. (Witness nodded.)

"Q. Liquidated the old CPA and reconstituted the Communist Party of the United States? A. That is correct, your Honor.

"Q. The same group of men? A. That is correct, your Honor."—*United States of America v. Dennis, et al*, Joint Appendix filed in the United States Circuit Court of Appeals for the Second Circuit, Vol. 5, pp. 3612, 3613.

7. In the trial of the above indictment the defendants offered as a witness on their behalf, Benjamin J. Davis, and said witness testified as follows:

"Q. Did you thereafter, Mr. Davis, attend the special convention of the Communist Political Association which was held on July 26 to July 28, 1945? A. I did.

* * * * * * *

[fols. 56-65] "Q. Mr. Davis, I show you Exhibit 25-A, which includes the resolution adopted by the Convention of the Communist Party on July 28, 1945, and ask you whether subdivision 7 in that resolution was added to the resolution which came out of the National Committee in June on the basis of the report which you made to the convention after the panel discussion had been completed? A. Yes."—*United States of America v. Dennis, et al*, Joint Appendix filed in the United States Circuit Court of Appeals for the Second Circuit, Vol. 11, pp. 8405, 8410.

It appears from the aforementioned facts of record that the Communist Party of the United States of America was organized as such Party on July 28, 1945 at a National Convention held in New York City from July 26 to July 28, 1945.

Ben Margolis.

Subscribed and sworn to before me this 17th day of September, 1951. Mary L. Rosenfield, Notary Public in and for said County and State. My Commission Expires Jan. 15, 1955.

[fol. 66] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

No. 22131 CD

MOTION FOR BILL OF PARTICULARS—Filed January 4, 1952

To the United States of America, Plaintiff, and to Walter S. Binns, United States Attorney, Its Attorney:

Please take notice, that the defendants William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson and Ben Dobbs, move the Court for an order directing the plaintiff, United States of America, by its attorney, the United States Attorney for the Southern District of California, to furnish and file a bill of particulars of the indictment herein in the following respects:

1. Did the conspiracy charged begin on or about June 28, 1940 or did it allegedly become illegal upon that date because of the enactment of the Smith Act upon which the indictment is based?

2. If the alleged conspiracy was in existence prior to June 28, 1940, state when it was formed and when each of [fols. 67-82] the defendants joined said alleged conspiracy.

[fol. 83] IN THE UNITED STATES DISTRICT COURT

No. 22131 CD

[Title omitted]

MOTION TO DISMISS INDICTMENT AS TO DEFENDANT SCHNEIDERMAN AS BARRED BY RES JUDICATA—Filed January 7, 1952

To the United States of America, Plaintiff, and to Walter S. Binns, United States Attorney, Its Attorney:

Please take notice that the defendant William Schneiderman moves the Court for an order dismissing the indictment herein, as to him, upon the following grounds:

1. The indictment is barred by res judicata as to the defendant William Schneiderman and the United States is, as to the defendant William Schneiderman, estopped to prosecute said indictment, by reason of the following matters and in the following particulars:

2. On June 30, 1939, the United States of America, plaintiff herein, filed in the Southern Division of the United States District Court for the Northern District of California a complaint against William Schneiderman, defendand there and defendant herein, charging this defendant with the same matters and offenses alleged in the present indictment and asking as relief that the defendant's naturalization as a citizen of the United States, which had been [fol. 84] awarded by the United States District Court for the Southern District of California, Central Division, on June 10, 1927, be surrendered and cancelled and adjudged fraudulently and illegally procured. The cause initiated by said complaint became No. 21257-R in the said Southern Division of said United States District Court for the Northern District of California, was heard before the Honorable Michael J. Roche, sitting as a judge of said court, and further heard on appeal by the United States Circuit Court of Appeals for the Ninth Circuit, and on certiorari by the Supreme Court of the United States, and the issues therein finally adjudicated and determined against the United

States and in favor of the defendant William Schneiderman.

3. That the following issues, which the same plaintiff seeks to relitigate against the same defendant in the present indictment, were framed by the pleadings in the aforesaid denaturalization case, that the United States had an opportunity to be heard and was heard thereon and presented evidence and argument, and were finally and conclusively adjudicated against the United States and in favor of the defendant William Schneiderman:

A. That the Communist Party of the United States of America is not a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence.

B. That the Communist Party of the United States of America does not believe in or advocate the overthrow of the Government of the United States by force and violence and that the association of the defendant William Schneiderman with other persons in said Party therefore does not constitute a conspiracy wilfully and knowingly to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, with the intent of [fol. 85] causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as soon as circumstances would permit.

C. That the defendant William Schneiderman, at the time he joined the Communist Party of the United States and for many years thereafter, did not believe in or advocate the overthrow of the Government of the United States by force and violence, and furthermore did not believe that the Communist Party of the United States believed in or advocated such doctrine, and consequently his membership in and association with said Party and efforts to promote the views and interests of said Party could not have constituted, on his part, a conspiracy to advocate the overthrow of the Government of the United States by force and violence, or to organize a society, group or assembly of persons who teach and advocate said doctrine, and could not

have been with the intent, on the part of the defendant William Schneiderman, to bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

4. In the course of the litigation of the aforesaid denaturalization case, the following intermediate questions of fact were put in issue, the United States had an opportunity to be heard thereon and was heard thereon both by evidence and argument, and said question were finally and conclusively determined adversely to the United States and in favor of the defendant William Schneiderman:

A. That to become a member, officer or functionary of the Communist Party, knowing the purposes of said Communist Party, and in such capacities to assume leadership in said Communist Party and responsibility [fol. 86] for carrying out its policies and activities, is a lawful activity, does not show lack of attachment to the principles of the Constitution of the United States, and does not show belief in, advocacy of, or intent to cause, overthrow of the Government of the United States by force and violence.

B. That to cause to be organized groups, clubs, section, and district, state and national units of said Communist Party, and to recruit and encourage recruitment of members to said Party, is a lawful activity, does not show lack of attachment to the principles of the Constitution of the United States, and does not show belief in, advocacy of, or intent to cause, overthrow of the Government of the United States by force and violence.

C. That to publish and circulate, and cause to be published and circulated, books, articles, magazines and newspapers, teaching and advocating the principles and program of the Communist Party, does not constitute the publication and circulation of materials teaching and advocating the duty and necessity of overthrowing the Government of the United States by force and violence, but, on the contrary, is a lawful activity, which does not show lack of attachment to

the principles of the Constitution of the United States, and which does not show belief in, advocacy of, or intent to cause, overthrow of the Government of the United States by force and violence.

D. That to write and cause to be written, articles and directives in publications of the Communist Party of the United States, advocating the principles and program of said Party, does not constitute teaching and advocating the overthrow and destruction of the Government of the United States by force and violence, but, on the contrary, is a lawful activity, which does not show lack of attachment to the principles of the [fol. 87] Constitution of the United States, and which does not show belief in, advocacy of, or intent to cause, overthrow of the Government of the United States by force and violence.

E. That to conduct and cause to be conducted schools and classes in which recruits and members of said Communist Party are indoctrinated in the principles of Marxism-Leninism does not constitute teaching and advocacy, or conspiracy to teach and advocate, the duty and necessity of overthrowing the Government of the United States by force and violence as speedily as circumstances would permit, but, on the contrary, is a lawful activity, which does not show lack of attachment to the principles of the Constitution of the United States, and which does not show belief in, advocacy of, or intent to cause, overthrow of the Government of the United States by force and violence.

5. The claim of the plaintiff United States that the conspiracy herein is the same conspiracy charged in *Dennis* v. *United States*, the allegation of the present indictment that the defendants in that case were co-conspirators with the present defendants, and the list of documents which the United States has filed notice of intention to produce, all demonstrate that certain other issues, not clearly shown upon the face of the indictment standing alone, are nevertheless issues which the Government intends to relitigate against the defendant Schneiderman and the Government could not hope to obtain a conviction of the defendant Schneiderman without relitigating such issues. These

issues also arose during the litigation of the aforesaid denaturalization case, as issues of fact, at which time the United States had an opportunity to be heard and was heard thereon both by evidence and argument, and the decision of said denaturalization case in favor of the defendant necessarily comprehended a final and conclusive adjudication of said issues adversely to the Government's [fol. 88] contentions and in favor of the defendant Schneiderman. These issues include:

A. That the term "Marxism-Leninism" does not mean or imply, and is not understood by members of the Communist Party and particularly by the defendant Schneiderman to mean or imply, overthrow of the Government of the United States by force and violence.

B. That the principles of Marxism-Leninism do not include overthrow of the Government of the United States by force and violence and belief in or advocacy of such principles does not amount to belief in or advocacy of such overthrow.

C. That the term "dictatorship of the proletariat" does not mean or imply, and is not understood by members of the Communist Party and particularly by defendant Schneiderman as meaning or implying, overthrow of the Government of the United States by force and violence, and belief in or advocacy of a dictatorship of the proletariat does not amount to belief in or advocacy of such overthrow.

D. That the following documents and writings, introduced as Government exhibits in the denaturalization case, do not advocate the overthrow of the Government of the United States by force and violence, nor does the circulation of such documents and writings, or membership in a party which circulates them, show belief in or advocacy of, or intent to bring about, the overthrow of the Government of the United States by force and violence, or lack of attachment to the principles of the Constitution of the United States:

(1) Constitution of the Communist Party of the United States of America, 1938 (Government's Exhibit [illegible] denaturalization case).

[fol. 89] (2) Programme of the Communist International, adopted 1928 (Government's Exhibit 6).

(3) Manifesto of the Communist Party by Marx and Engels (Government's Exhibit 7).

(4) State and Revolution by Lenin (Government's Exhibit 8).

(5) Left-Wing Communism: an Infantile Disorder, by Lenin (Government's Exhibit 9).

(6) Programme of the Young Communist International (Government's Exhibit 10).

(7) The Theory and Practice of Leninism, by Stalin (Government's Exhibit 11).

(8) The 4th National Convention, Workers (Communist) Party of America, Chicago, 1925 (Government's Exhibit 12).

(9) The Second Year of the Workers Party of America, by C. E. Ruthenberg (Government's Exhibit 13).

(10) Acceptance Speeches of William Z. Foster and Benjamin Gitlow, 1928 (Government's Exhibit 14).

(11) The Platform of the Class Struggle (Workers Library Publishers), 1928 (Government's Exhibit 15).

(12) A B C of Communism, by Bucharin and Preobaschensky (Government's Exhibit 16).

(13) The International of Youth (Government's Exhibit 17).

(14) Why Communism? by M. J. Olgin (Government's Exhibit 18).

E. That the fact that the Communist Party adopted the principles of Marxism-Leninism, and the alleged goal of bringing about a dictatorship of the proletariat, and circulated the documents and writings listed in the preceding paragraph, and others like them, does not [fol. 90] show that the Party believed in or advocated, or conspired to advocate, or intended to advocate or to bring about, overthrow of the Government by force and violence.

F. That the fact that the defendant William Schneiderman believed in and advocated Marxism-Leninism and circulated the documents and writings listed in Paragraph D, supra, and others like them, and was an active member and leader of the Communist Party, does not show that he believed in or advocated, or conspired to advocate, or intended to advocate or to bring about, overthrow of the Government of the United States by force and violence.

G. That the principles and program of the Third International, also known as the Communist International, did not include overthrow of the Government of the United States by force and violence, and that the affiliation of the Communist Party of the United States to said International, during the period when it was so affiliated, did not show belief in, or advocacy of, or intent to bring about, such overthrow, and that membership in the Communist Party, during the period of such affiliation, with knowledge of such affiliation, did not show belief in, or advocacy of, or intent to bring about, such overthrow, and did not show lack of attachment to the principles of the Constitution of the United States.

H. Belief in Marxism-Leninism, advocacy of Marxism-Leninism and of a dictatorship of the proletariat, circulation of writings like those listed in Paragraph D, active membership and leadership in the Communist Party, membership in an affiliate of the Communist International, and attachment to its principles and program, are all, individually and taken together, insufficient to show intent to cause the over- [fol. 91] throw of the Government *of the Government* of the United States by force and violence as speedily as circumstances would permit.

6. The defendant William Schneiderman, having been compelled to litigate such issues at the expenditure of great effort, time and expense, ought not now to be compelled to relitigate the same issues in defense of this indictment.

7. The plaintiff United States, having once had its full day in court in regard to said issues, and having been fully

heard in regard thereto, ought not now to be given a second opportunity to relitigate the same matters and questions.

8. The defendant William Schneiderman, following the decisions of the United States Supreme Court in the said denaturalization proceeding, and following the acquiescence of the United States in said decision by its failure to take any other or further steps to accomplish the denaturalization of the defendant Schneiderman, had a right to rely and did rely on said decision as a final and conclusive adjudication with respect to each and all of the matters herewith referred to and that his political beliefs, advocacy, activities and affiliations were unlawful and protected by the United States Constitution and the Bill of Rights, and that he could continue them without fear of further harassment by the Government; the United States, under these circumstances, is now estopped to assert that the continuation of said political beliefs, advocacy, activities and affiliations, in reliance on said decision, constituted a violation of the criminal laws of the United States, and particularly is so estopped with respect to each and all of the matters set forth in the indictment herein.

This motion is and will be based on Rule 12 of the Federal Rules of Criminal Procedure and all other applicable statutory and constitutional provisions, the transcript of record on appeal submitted with this motion and made a part hereof, the reported opinions in said case in 33 F. Supp. 510, [fols. 92-96] 119 F. 2d 500, and 320 U. S. 118, the memorandum of points and authorities in support of this motion, and upon all the records, files and proceedings heretofore had under this indictment and under the preceding indictments, *United States* v. *William Schneiderman, et al.*, No. 21883 CD, and *United States* v. *Frank Spector, et al.*, No. 21940 CD.

Ben Margolis, Attorney for defendant William Schneiderman.

[fol. 97] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

No. 22131 CD

[Title omitted]

MOTION TO DISMISS INDICTMENT AS TO DEFENDANTS HEALEY, LIMA, YATES, LAMBERT, CONNOLLY, KUSNITZ, RICHMOND, FOX, STEINBERG, STACK, DOYLE, SPECTOR, CARLSON AND DOBBS AS BARRED BY RES JUDICATA—Filed January 7, 1952

To the United States of America, Plaintiff, and to Walter S. Binns, United States Attorney, Its Attorney:

Please take notice that the defendants Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson, and Ben Dobbs, move the Court for an order dismissing the indictment herein, as to them, upon the following grounds:

1. The indictment is barred by res judicata as to the defendants Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack, Mary Bernadette Doyle, Frank Efroim Spector, Frank Carlson, and Ben Dobbs, and the United States is, as to the aforesaid defendants, estopped to prosecute said indictment, by [fol. 98] reason of the following matters and in the following particulars:

a) Upon all the grounds and particulars set forth in the Motion To Dismiss Indictment As To Defendant Schneiderman As Barred By Res Judicata, and the defendants incorporate by reference and make a part hereof as if fully set forth at length with respect to them and each of them, each and every allegation contained in the aforesaid motion and the exhibits submitted therewith.

b) The indictment herein alleges that the aforesaid de-

fendants and the defendant Schneiderman were in privity and mutually interested and connected with the same matters and offenses as were charged in the proceedings brought by the plaintiff herein against defendant Schneiderman, as alleged in the motion of defendant Schneiderman aforesaid, and by reason thereof the plaintiff, having once had its full day in court, ought not now to be given a second opportunity to relitigate the same matters and questions heretofore adversely decided against plaintiff, in this prosecution against the aforesaid defendants and defendant Schneiderman.

This motion is and will be based on Rule 12 of the Federal Rules of Criminal Procedure and all other applicable statutory and constitutional provisions, the exhibits heretofore incorporated by reference, the memorandum of points and authorities in support of Motion To Dismiss Indictment As To Defendant Schneiderman As Barred By Res Judicata, and upon all the records, files and proceedings heretofore had under this indictment and under the preceding indictments, *United States* v. *William Schneiderman, et al.*, No. 21883 CD, and *United States* v. *Frank Spector, et al.*, No. 21940 CD.

Leo Branton, Jr., attorney for defendants Henry [fol. 99] Steinberg, Ben Dobbs; Norman Leonard, attorney for defendants, Loretta Starvus Stack, Ernest Otto Fox, Frank Carlson; Ben Margolis, attorney for defendants, Oleta O'Connor Yates, Mary Bernadette Doyle; Alexander H. Schullman, attorney for defendants, Dorothy Rosenblum Healey, Philip Marshall Connelly; Leo A. Sullivan, attorney for defendants, Albert Jason Lima, Carl Rude Lambert; A. L. Wirin, attorney for defendants, Rose Chernin Kusnitz, Al Richmond, Frank Spector.

[fol. 100] [File endorsement omitted]

EXCERPTS FROM THE RECORD IN SCHNEIDERMAN V. UNITED STATES (320 U. S. 118), SUBMITTED IN CONNECTION WITH MOTION TO DISMISS BASED ON RES JUDICATA—Filed January 9, 1952

This document includes excerpts from the following from the record of the earlier *Schneiderman* case:

1. The pleadings
2. The trial
3. The opinion of the trial court
4. The findings of fact and conclusions of law
5. Points raised on appeal
6. The opinion of the Court of Appeals
7. The opinions, majority, and dissenting, of the Supreme Court

All for the purpose of showing the issues adjudicated in that case.

I

THE PLEADINGS

* Numbers refer to pages of the *Schneiderman* record, Exhibits A and B.

Complaint (T. R. 1-10)*

Preamble recites that the complaint is based upon Section 15 of the Act of June 29, 1906 (this Section authorized denaturalization in cases where citizenship was procured by illegality or fraud).

Answer

I and II	I and II
Alleges that on June 10, 1927 Schneiderman was admitted to citizenship and issued a certificate of naturalization, and that by virtue of the certificate of naturalization he claimed to be a citizen and entitled to the benefits of citizenship.	Admits.
III	III
The execution of an affidavit by one Charles, an attorney for the Immigration Service showing cause for for the institution of the proceedings. The affidavit is attached to the complaint and alleges that affiant is an attorney for the Immigration Service and has access to its records, "from which the following facts appear":	Denies.
1. That on 2/28/24 Schneiderman declared his intention to become a citizen and was naturalized on 6/10/27. [fol. 101]	
2. That Schneiderman stated under oath in his petition for naturalization that he was not a disbeliever in or opposed to organized government, that he was not a member of or affiliated with an organization teaching such doctrines, that he was attached to the prin-	

III

ciples of the Constitution, that his petition was verified by two persons who stated that he was of good moral character and attached to the principles of the Constitution; and that in open court he took an oath of allegiance to the United States.

3. That "in truth and *in fact* during the five years immediately preceding the filing of his said petition for naturalization, and from the date of said petition to the time of his admission to citizenship, the said William Schneiderman did not behave as a person attached to the principles of the Constitution of the United States, and he was not attached to such principles, but during said five-year period, and thereafter he was a member of an organization, to wit—The Workers (Communist) Party of America, *which organization* is opposed to the Government of the United States, and; *teaches and advocates the overthrow of the Government of the United States by force and violence;*" (T. R. 8)

4. That the naturalization was illegally and fraudulently procured.

IV

The decree and certificate were illegally procured in that:

Schneiderman was not at the time of his naturalization and for 5 preceding years had not behaved as a person attached to the principles of the Constitution, but "in truth and in fact during all of said times, respondent was a member of and affiliated with and believed in and supported the principles of certain organizations then known as the Workers (Communist) Party of America and the Young Workers (Communist) League of America, *whose principles were opposed to* the principles of the Constitution of the United States and *advised, advocated and taught the overthrow of the Government*, Constitution and laws *of the United States by force and violence*." (T. R. 3)

IV

Denies all of the allegations but admits that he was a member of the Communist Party of the United States of America.

[fol. 102] V

That "at all times *subsequent* to the entry of said decree of naturalization" he continued to be a member of and affiliated with the same organizations mentioned in paragraph IV and, in addition the *Communist Party of*

Denies the allegations except admits that he is now a member of the Communist Party of the United States of America.

V

the United States of America and the Young Communist League of the United States "*whose principles* are opposed to the principles of the Constitution of the United States and *advise, advocate and teach the overthrow of the Government*, Constitution and laws *of the United States by force and violence*, and during all of said times respondent has continued to believe in and support said principles of said organizations." (T. R. 4)

VI

The naturalization was procured by fraud in that he concealed from the naturalization court the fact that at the time of the filing of his petition and at the time of his naturalization and during the preceding 5 year period, he was and had been a member of and affiliated with the organizations previously named and that he "believed in and supported the principles of said organizations as aforesaid" and that this concealment not only deceived the court but was material in this: "That at all times herein mentioned *the principles of said organizations* were opposed to the principles of the Constitu-

VI

Denies the allegations and "in particular . . . denies that at any time during which [he] was a member of said organization that said organization, or the principles of said organization, or the tenets of said organization, or the teachings of said organization, or the belief of said organization, or either of them were opposed or contrary to the principles of the Constitution of the United States; and *specifically denies that either said respondent or said organizations advised or advises, advocated or advocates, taught or teaches the overthrow of the Government* or the Constitution or

VI

tion of the United States and *advised, advocated and taught the overthrow of the Government,* Constitution and laws *of the United States" by force and violence.* (T. R. 5)

[fol. 103]

VI

the laws, or the Government, Constitution and laws *of the United States by force and violence or force or violence."* (T. R. 11)

"And as and for a separate, further and distinct defense to said complaint, and the alleged cause of action therein purportedly stated, *respondent denies that at any time during which he was a member of said Communist Party of the United States of America, that said organization believed in, taught, or advocated the overthrow of the Government of the United States of America, its Constitution, or its laws; and specifically denies that during said time the said Communist Party of the United States advised, advocated, or taught the overthrow of the Government of the United States,* its Constitution and laws, or said Government, Constitution, or laws, *by force and violence, or force or violence, or by any other manner, or at all.*

"And in this connection, respondent alleges that respondent and the said Communist Party of the United States of America believes

VI

VI

in, advocates, teaches, and is committed to uphold the achievements of democracy and the rights of and to, life, liberty, and the pursuit of happiness; and to defend the United States Constitution against all of its enemies.

"And as and for a further, separate and distinct defense to said complaint on file herein, respondent attaches hereto and makes a part hereof as though set out in haec verba, a copy of the Constitution of the Communist Party of the United States of America, which is marked Exhibit 'A,' and alleges that the aims, purposes and objects of said Constitution sets forth the aims, purposes, objects, beliefs, advocacies and teachings of said organization during all of the times alleged in said complaint on file herein." (T. R. 12-13)

The Constitution of the Communist Party of 1938 which is attached to the answer contains among others the following:

"Preamble. The Communist Party of the United States of America is a working class political party carrying forward today the traditions of Jefferson,

VI

VI

Paine, Jackson and Lincoln, and of the Declaration of Independence; it upholds the achievements of democracy, the rights of 'life, liberty, and the pursuit of happiness,' and defends the United States Constitution against its reactionary enemies who would destroy democracy and all popular liberties; . . . by the establishment of Socialism, according to the scientific principles enunciated by the greatest teachers of mankind, Marx, Engels, Lenin and Stalin, embodied in the Communist International; . . . (T. R. 14-15)

[fol. 104]

"ARTICLE VI. Rights and Duties of Members, Section 1. The Communist Party of the U.S.A. upholds the democratic achievements of the American people. It opposes with all its power any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy whereby the majority of the American people have obtained power to determine their own destiny in any degree. . . . (T. R. 18-19)

"ARTICLE X. Disciplinary Procedure . . . Section 5.

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Party members found to be advocates of terrorism and violence as a method of Party procedure . . . shall be summarily dismissed from positions of responsibility, expelled from the Party and exposed before the general public." (T. R. 20)

II

The Trial

The United States Attorney made an opening statement in which he summarized the foregoing pleadings and then said (T. R. 70) that the government expected to show that Schneiderman advocated principles "at variance with the principles of our government," that he was a member of societies that "teach doctrines at variance with our Constitution," that "he believed in the overthrow of our system of Government, whether by force or otherwise; and we believe we can establish that it was by force." (T. R. 71) He said that the Government was going to establish these facts by the activities of Schneiderman "both prior to the time of his admission *and subsequent* to his admission to citizenship . . . also by the *principles*, the *platforms*, *propaganda* of the organizations of which he was a member and an official, and to which he subscribed during all this period of time." (T. R. 71)

"During the course of a colloquy on the admission of evidence later, the United States Attorney stated that it was the Government's theory that when Schneiderman was naturalized he believed inter alia "in the overthrow of capitalistic government *by force and violence.*" (T. R. 151)

The Government introduced as Exhibit 4, the affidavit of the Immigration Service attorney, Charles (see above). (T. R. 81)

The Government introduced as Exhibit 5, the 1938 Constitution of the Communist Party (see above). (T. R. 84)

The Government called Schneiderman as a witness.

Schneiderman's testimony:

He was affiliated with the Young Workers League and held office in it (T. R. 86, 87, 91). He organized classes to study "the theory of Marxism"; the books (T. R. 180-181; Government Exhibits 20-25) used in those classes were "the generally accepted writings of Marx and Lenin" (T. R. 87-88); they included the "Communist Manifesto," "State & Revolution," and "Left-Wing Communism" (T. R. 89). The Young Workers League became the Young Communist League, affiliated with the Young Communist International. (T. R. 90).

[fol. 105] He joined the Workers Party, later the Communist Party of the United States of America. (T. R. 91). Since then he has been affiliated with it, has subscribed to its principles and held office in it. (T. R. 92-99)

The Party conducted study classes to "Teach the theories and practice of Marxism and Leninism" in which were used about the same books as were used in the Young Workers League classes (T. R. 94).

"Q. During all this period to which you have testified you were a member of the Young Workers' League, Young Workers' Party, Young Workers' Communist League, Young Communist League, Workers' Party, Workers' Communist Party and Communist Party of the United States of America, you subscribed to the principles of those parties during all of those years, didn't you?

"A. Yes, I did.

"Q. During all this period, you believed in and advocated the doctrine of the Socialistic principles promulgated by Marx and Lenin at that time?

"A. I believed in the essential correctness of the Marx theory as applied by the Communist Party of the United States.

"Q. Did you also subscribe to the philosophy and principles of Socialism as manifested in the writings of Lenin?

"A. Yes." (T. R. 102-103)

He agreed with the general political and theoretical conclusions of the 1928 program of the Communist International, insofar as it interprets general Marxist-Leninist theories.

The document is then introduced as Government Exhibit 6 and excerpts are read into the record (T. R. 109-122).

He approved the principles of the Communist Manifesto: "This Manifesto is the basis of tactics for Communism, under the Marxian theory. I believe that these general principles of Marxism, particularly as they apply to the period in which they were written and the country about which they were written, are entirely correct." (T. R. 123) He approved those principles when he was admitted to citizenship. (T. R. 123)

The Manifesto is received in evidence as Government Exhibit 7 and excerpts appear at pp. 124-127.

"State & Revolution" by Lenin is admitted as Government Exhibit 8. Excerpts appear at pp. 129 to 143.

"Left-Wing Communism" by Lenin is introduced in evidence as Government Exhibit 9, excerpts appearing at pp. 145 to 147.

"Program of the Young Communist International" is received in evidence as Government Exhibit 10 and excerpts appear at pp. 152 to 157.

Stalin's "Theory and Practice of Leninism" is marked for identification as Government Exhibit 11 (T. R. 160). No excerpts are read although later in the Supreme Court, Chief Justice Stone treats it as having been received in evidence and quotes from it in his dissenting opinion.

Government Exhibits 12 to 17 for identification are marked:

12: "National Convention of the Workers Party, 1925";
13: "Second Year of the Workers Party of America";
[fol. 106] 14: Acceptance speech of Foster and Gitlow at the 1928 Communist Party convention;
15: 1928 Communist Party election platform;
16: "ABC of Communism" by Bukharin;
17: The International of Youth.

These are lafer introduced through the witness Hynes (T. R. 238-272).

Olgin's "Why Communism" is received in evidence as Government Exhibit 18 and excerpts are quoted at pp. 166 to 174.

"New Frontiers for Pioneers of 1937" is marked Government Exhibit 19 for identification and later introduced through the witness Hynes (T. R. 273).

The government called Miles G. Humphreys as a former member of the Communist Party (T. R. 181-182) to testify that the party taught the overthrow of the government by force and violence (T. R. 198-200) and that the party used and circulated the books already identified as Exhibits 6, 7, 8, 9, 10, 11, supra (T. R. 206-218).

The government called William F. Hynes as a witness to identify Exhibits 12-17 and 19 and through him to offer them in evidence and to testify as a former party member and "expert" (T. R. 326 that the party's "method of bringing about a change in the form of Government is one of force and violence." (T. R. 330)

In response to a motion for a nonsuit, the government argued that its evidence shows that the Communist Party advocates force and violence and contemplates the use of force and violence. (T. R. 351)

The Defense

Schneiderman called as a witness.

He denies he advocated force and violence (T. R. 360-1).

He denies that the Communist Party advocated force and violence (T. R. 369, 373 et seq.).

The Defense introduced many exhibits (B-P, S, T and U) to meet the claim that the Communist Party advocates force and violence. (T. R. 401-474; 829-948)

Cross examination of Schneiderman by the government deals with the aims and objectives of the Communist Party (T. R. 861-2), its attitude toward the Government of the United States (T. R. 866), the method contemplated by it to establish socialism (T. R. 863-5), how the changes are proposed to be brought about (T. R. 867-8), what Lenin and Stalin taught about force and violence (T. R. 876, 879), and Schneiderman's own views on force and violence (T. R. 885).

The Defense offers the direct and cross examination of

two Stanford professors—one of philosophy (Harold C. Brown) and one of political science (Walter Thompson) to meet the contention that the doctrines of Marxism-Leninism means advocacy of force and violence. There is extensive direct and cross examination on this point. (T. R. 477-758) (Defendant's Exhibits Q and R)

III

The Opinion of the Trial Court

The trial court (33 F. Supp. 510) ruled that the methods contemplated by the Communist Party were shown to involve force and violence. The court based this conclusion [fol. 107] on an examination of Marxist literature covering almost a century, as well as on all the testimony of the witnesses heard.

The following quotation gives the essence of the ruling on this point:

> "The government has placed in evidence many volumes of books and pamphlets which explain the doctrines of Marx, Engels, Lenin and Stalin, upon which the principles and practices of the Communist Party and its predecessor organizations are based. It has also called upon three witnesses, including defendant, to explain the position of the Communist Party and these predecessor organizations with respect to communist ends and communist means. *The literature covers almost a century of economic and political thought, beginning with the publication of the Communist Manifesto in 1848.* All of this printed material, together with the testimony of the witnesses, may be examined for the purpose of shedding light on the period between 1922 and 1927, when defendant was on probation. In addition, the court may note defendant's conduct, as outlined above, in order to throw light on his state of mind during the probationary period.
>
> "The evidence before the court makes it clear that defendant's organizations sought to establish 'the dictatorship of the proletariat', as a primary goal in a vague and indefinite program looking toward the eventual creation of a classless society. The evidence

further discloses that *methods of force and violence* were, and are, accepted as necessary for the attainment of this 'dictatorship of the proletariat'. 'It would be difficult indeed to interpret (the many expressions set forth in the literature submitted in evidence) as indicating that the Communists expected to obtain their ends by peaceable means.' Kenmotsu v. Nagle, 9 Cir., 1930, 44 F. 2d 953, 955.

"The conclusion which this court reaches, after a careful reading of the writings placed in evidence and a review of the testimony of the several witnesses who appeared at the trial, is that the organizations to which defendant belonged were opposed to the principles of the Constitution and advised, taught and advocated the overthrow of the government by force and violence, and that defendant, by reason of his membership in such organizations and participation in their activities, was not 'attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.' In re Saralieff, above. Therefore, defendant obtained his certificate of citizenship illegally." (33 F. Supp. at 512, 513)

IV

Finding number IV which corresponds to paragraph IV of the original complaint states that Schneiderman's naturalization was illegally procured because it was not true that he was not a disbeliever or opposed to organized government and the court finds further that:

". . . in truth and in fact during all of said times respondent had not behaved as a man attached to the principles of the Constitution of the United States and *well* disposed to the good order and happiness of the same, but was a member of and affiliated with and believed in and supported the principles of certain organizations known as the Workers Party of America, the Workers (Communist) Party of America, the Communist Party of the United States of America, the [fol. 108] Young Workers League of America, the Young Workers (Communist) League of America and

the Young Communist League of America, which organizations were, and each of them was, at all times herein mentioned, a section of the Third International the principles of all of which said organizations were opposed to the principles of the Constitution of the United States, and *advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence*, and taught disbelief in and opposition to organized government." (T. R. 49)

The court, in Finding number V, brings these findings down to the date of the trial, stating that respondent has been and now is a member of said organizations and has continued to believe in, advocate and support the said principles of said organizations. In Finding number VI, Schneiderman's failure to disclose these memberships to the Naturalization Court is found to be fraudulent on the grounds that the principles of said organizations were opposed to the Constitution of the United States and "advised, advocated and taught the overthrow of the government, constitution and laws of the U. S. by *force and violence* and taught disbelief in and opposition to organized government. In Finding number VII, the respondent's oath of allegiance is found to be false on the grounds that he intended "to adhere to and support and defend and advocate the principles and teachings of said Third International, which principles and teachings were opposed to the principles of the Constitution of the United States, and advised, advocated and taught the *overthrow of the government*, constitution and laws of the United States." (T. R. 50-51)

The court further finds in paragraph IX that "it is not true that respondent and the Communist Party of the United States of America believe in, advocate, teach or are committed to uphold the achievements of democracy or the rights of and to life, liberty and the pursuit of happiness or to defend the United States Constitution against all of its enemies." (T. R. 52)

The conclusion of law is that the certificate of naturalization was procured illegally and by fraud and should be set aside and cancelled.

V

Points on Appeal

The appeal raised, among others, the question of the insufficiency of the evidence to show that Schneiderman or any organization with which he was associated or of which he was a member believed in or advocated the overthrow of the Government of the United States by force and violence. (T. R. 901 (pt. 3))

It also asserted that Findings IV, VI, VII, and IX were not supported by the evidence. (T. R. 901)

These findings, summarized above, dealt with the issue of force and violence.

[fol. 109]

VI

The Opinion of the Court of Appeals

The opinion of the Court of Appeals, Ninth Circuit (119 F.2d 500) reviews the history of the case, summarizes the pleadings and trial court findings. The court finds it unnecessary to consider whether there was proof of fraud and narrows the question down to whether the findings of the trial court that naturalization was illegally procured are clearly erroneous.

The court holds the finding not clearly erroneous on two grounds: first, there is substantial evidence, which if believed, leads to the conclusion that the ultimate aims of the Communist Party (abolition of private property, dictatorship of proletariat, etc.) are "not those of our Constitution." (Page 504)

The second reason for reaching the same conclusion is the evidence regarding force and violence as to which the court says the following:

> "In bringing these aims about, we find sharply conflicting views as to what method the Communist Party advocates. There is substantial evidence that the Communist Party expects to use and advocates overthrow of our government *by force and violence*. There is other evicence to support the view that such party neither contemplates nor advocates the use of force and violence in the overthrow of our government. In

view of the direct conflict of evidence with respect to this question, we are unable to say that the finding of the trial court to the effect that the Communist Party advised, advocated and taught the overthrow of the Constitution and laws of the United States by force and violence was clearly erroneous." (119 F.2d, at 504)

VII

The Opinions of the Supreme Court

The Supreme Court's opinion (320 U.S. 118) reversed the courts below.

The government's claim is summarized at 320 U.S. 135:

> "The claim that petitioner was not in fact attached to the Constitution and well disposed to the good order and happiness of the United States at the time of his naturalization and for the previous five year period is twofold: First, that he believed in such sweeping changes in the Constitution that he simply could not be attached to it; Second, that *he believed in and advocated the overthrow by force and violence* of the Government, Constitution and laws of the United States."

The force and violence contention of the government is summarized by the court as follows: "The Government contends that petitioner was not attached because he believed in the use of force and violence instead of peaceful democratic means to achieve his desires. *In support of this phase of its argument the Government asserts that the organizations with which petitioner was actively affiliated advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence*, and that petitioner therefore believed in that method of governmental change." (Page 146)

The court notes that the record is barren of any conduct [fol. 110] or statement on petitioner's part indicating belief or advocacy of force and violence and that this conclusion can only be reached by finding that "*such was a principle of the organizations* to which he belonged and then impute that principle to him on the basis of his activity in those organizations and his statement that he subscribed to their principles." (Pages 146, 147)

Reviewing the government's evidence on this point the court notes as the documents published prior to 1927 which have been particularly stressed by the government: The Communist Manifesto, State and Revolution, Statutes of the Communist International, and Stalin's Theory and Practice of Leninism. Excerpts from these are quoted in the footnotes. (Pages 152 and footnotes 39 and 40)

The evidence was found insufficient to meet the standards of proof on two grounds: First, that the government's case is "subject to the many infirmities of proof by imputation," (Page 154) Which difficulties are "increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are."

The Second weakness which the court criticizes is that the evidence as to the Communist Party's principles is "sharply conflicting" especially with regard to the crucial issue of force and violence. (Page 155). To show this conflict, the court quotes briefly from the Manifesto, from passages by Stalin and Lenin and from the Communist Party Constitution. (Pages 155, 157)

The court then states:

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open." (Page 157)

The dissenting opinion of Chief Justice Stone urges that the trial court's findings are abundantly supported by the evidence and should not be disturbed on appeal.

The dissenting opinion quotes much of the government's evidence and says:

> "There is abundant documentary evidence of the character already described to support the court's finding that the Communist Party organizations, of which petitioner was a member, diligently circulated printed mat-

ter which advocated the overthrow of the Government of the United States by force and violence, and that petitioner aided in that circulation and advocacy." (320 U.S., at 190)

In conclusion, Stone states: "On the record before us it would be difficult for a trial judge to conclude that petitioner was not well aware that he was a member of and aiding a Party which taught and advocated the overthrow of the Government of the United States by force and violence."

As an appendix to his opinion, Stone includes extensive excerpts from the statutes of the Communist International and from State and Revolution.

[fol. 111] Thus the dissenting opinion, as much as or even more than the majority opinion, makes it clear that the basic question which the government now proposes to adjudicate against Schneiderman is the same question of fact which was the principal question adjudicated in the denaturalization case.

[fol. 112] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131—Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM SCHNEIDERMAN, et al., Defendants

ORDER ON MOTION TO DISMISS INDICTMENT—January 11, 1952

This cause having come before the court for hearing on motion of defendants filed January 3, 1952 to dismiss the indictment; and the motion having been argued and submitted for decision;

It is now ordered that defendants' motion to dismiss the indictment be and is hereby denied.

It is further ordered that the Clerk this day serve copies

of this order by United States mail on the attorneys for the parties appearing in this cause.

January 11, 1952.

Wm. C. Mathes, United States District Judge.

[fol. 113] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131—Criminal

[Title omitted]

ORDER ON MOTION FOR BILL OF PARTICULARS—January 11, 1952

This cause having come before the court for hearing on motion of defendants filed January 4, 1952 for bill of particulars; and the motion having been argued and submitted for decision;

It is now ordered that defendants' motion for bill of particulars be and is hereby denied.

It is further ordered that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

January 11, 1952.

Wm. C. Mathes, United States District Judge.

[fols. 114-119] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131 CD

[Title omitted]

STIPULATION—Filed January 11, 1952

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties that

I. The affidavit of Ben Margolis, Esquire, verified September 17, 1951, heretofore filed in the office of the Clerk of this Court in support of the motion to dismiss the indictments in *United States v. Schneiderman, et al*, No. 21883 CD, and *United States v. Spector, et al*, No. 21940 CD, shall be treated as if annexed to the motion to dismiss the indictment in the above entitled proceeding and considered by the Court as if fully therein set forth at length.

[fols. 120-166] ORDER

It is so ordered.

Dated: This 11th day of January, 1952.
Wm. C. Mathes, United States District Judge.

[fols. 167-387] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131—Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM SCHNEIDERMAN, et al., Defendants.

ORDER ON MOTIONS TO DISMISS INDICTMENT AS BARRED BY RES JUDICATA—January 24, 1952

This cause having come before the court for hearing on motions of the defendants, filed January 7, 1952, to dis-

miss the indictment as barred by res judicata; and the motions having been argued and submitted for decision;

It Is Now Ordered that the motions of the defendants to dismiss the indictment as barred by res judicata be and are hereby denied.

It Is Further Ordered that the Clerk this day serve this order by United States mail on the attorneys for all the parties appearing in this cause.

Wm. C. Mathes, United States District Judge.

January 24, 1952.

[fol. 388] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT OF ACQUITTAL.—Filed June 2, 1952

To the United States of America, Plaintiff, and to Walter S. Binns, United States Attorney, Its Attorney:

Please Take Notice that the defendants William Schneiderman, Dorothy Healey Connelly, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack, Ben Dobbs, Frank Carlson and Frank Spector, jointly and individually, move the Court for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure upon the following grounds, among others:

1. The evidence herein, if held by the Court to be sufficient to sustain a conviction of the offense charged in the indictment herein, results in an unconstitutional application and construction of the Smith Act, 18 U. S. C. 2385, and the general conspiracy statute, 18 U. S. C. 371, in violation of the rights of these defend-
[fol. 389] ants under the Constitution of the United States as hereinafter more particularly set forth:

(a) The evidence discloses only the exercise by these defendants, and each of them, of their rights to freedom

of speech, freedom of press, freedom of assembly, and to petition the government for redress of grievances, guaranteed to them by the First Amendment.

(b) The evidence establishes no more than an assembly of persons for the purpose of expressing ideas and opinions at some remote, uncertain and indefinite time in the future, and a conviction based upon such evidence would result in a prior restraint on speech, press and assembly in violation of the First Amendment.

(c) The evidence fails to establish a clear and present danger of an evil which the government has a right to prohibit, or a danger whose gravity, discounted by its probability, justifies an invasion of the constitutional rights guaranteed to the defendants.

(d) The evidence consists of acts and statements, oral or written, of any alleged Communist made in any place at any time for the purpose of attaching criminality not to the acts of the individual defendants but to an entire political movement and, as such, raises questions so broad in scope as to make a fair trial within the limits of criminal procedure and jury trial impossible, all in violation of the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

(e) The use by the prosecution of statements and incidents unlimited in time or place, without notice to the defendants as to the statements and incidents upon which the prosecution would rely, deprives the defendants of their rights under the Sixth Amendment to be informed of the nature and cause of the accusation and [fol. 390] to a fair opportunity to procure witnesses in their own defense and deprives them of their liberty without due process of law in violation of the due process clause of the Fifth Amendment.

(f) The attempt to found the prosecution's case as to the alleged nature of the Communist Party upon the unsworn writings and statements of persons not before the court for cross-examination deprives the defendants of their rights under the Sixth Amendment to be confronted with the witnesses against them.

(g) The evidence presents not a question of fact but a question of political philosophy which is not triable by a jury, and the power to pass judgment on political philosophy has not been conferred upon or delegated to the United States but is reserved by the First, Ninth and Tenth Amendments to the American people as a whole.

(h) The evidence presents only criticism of government, governmental policies and social and economic systems which the government is without power to punish without offending the guarantees of the First, Ninth and Tenth Amendments.

(i) The evidence purports to attach criminality to the Communist Party and the members and officers thereof and a conviction thereon would constitute the Smith Act a bill of attainder as construed and applied in violation of Article I, Section 9, Clause 3 of the Constitution.

2. The evidence is insufficient to sust in a conviction of the offense charged in the indictment in at least the following respects:

(a) The evidence is insufficient to establish that defendants, or any of them, had any personal intent to [fol. 391] cause the overthrow or destruction of the Government of the United States by force and violence.

(b) The evidence is insufficient to establish that the defendants, or any of them, had any personal intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

(c) The evidence is insufficient to establish that the defendants, or any of them, conspired to advocate or to teach the duty or necessity of overthrowing the Government of the United States by force and violence.

(d) The evidence is insufficient to establish that the defendants, or any of them, conspired to organize, or to help to organize, as the Communist Party of the United States of America a society, group or assembly of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence.

(e) The evidence is insufficient to establish that the principles of Marxism-Leninism constitute the advocacy or the teaching of the duty or necessity of overthrowing or destroying the Government of the United States by force and violence.

(f) The evidence is insufficient to establish that the defendants, or any of them, understood or interpreted the principles of Marxism-Leninism as advocating or teaching the duty or necessity of overthrowing or destroying the Government of the United States by force and violence.

(g) The evidence is insufficient to establish that the defendants, or any of them, conspired to, or did, advocate or teach the duty or necessity of overthrowing [fol. 392] the Government of the United States by force and violence either by organizing or by helping to organize the Communist Party of the United States of America, or by advocating or teaching the principles of Marxism-Leninism, or by any other means whatsoever.

(h) The evidence is insufficient to establish that the defendants, or any of them, intended or intend to overthrow the Government of the United States by force and violence by advocacy thereof, or by any other means whatsoever (*Dennis v. United States*, 341 U. S. 491, 499-500, 516).

(i) The evidence is insufficient to establish that the nature of defendants' activities, or of any of them, was the advocacy or teaching of the duty or necessity of overthrowing the Government of the United States by force and violence, or the organizing or helping to organize, as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence (*Dennis v. United States*, 341 U. S. 491, 497-498, 502, 516).

(j) The evidence is insufficient to establish that the defendants, or any of them, had the "power to bring about the evil" (*Dennis v. United States*, 341 U. S. 491, 498, 516).

(k) The evidence is insufficient to establish that the defendants, or any of them, conspired to advocate or to teach the duty or necessity of overthrowing the Government of the United States by force and violence, or to organize or help to organize as the Communist Party of the United States of America a society, group or as- [fol. 393] sembly of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action (*Dennis v. United States*, 341 U. S. 491, 511-512).

(l) The evidence is insufficient to establish that the overt acts of the defendants, or of any of them, were in furtherance of the conspiracy alleged in the indictment or to effect the objectives thereof.

3. The evidence affirmatively establishes that the defendants, and each of them, have not committed the offense charged in the indictment in at least the following respects:

(a) The evidence affirmatively establishes that the Communist Party was organized long before 1940 and therefore no conspiracy to organize it could have existed during the period covered by the indictment.

(b) The evidence affirmatively establishes that the Communist Party, if re-organized at any time after 1940, was re-organized no later than 1945, and therefore no conspiracy to organize it or re-organize it could have existed within the three year period of the statute of limitations.

(c) The evidence affirmatively establishes that the principles of Marxism-Leninism do not constitute the advocacy or the teaching of the duty or necessity of overthrowing or destroying the Government of the United States by force and violence.

[fol. 394] (d) The evidence affirmatively establishes that none of the defendants conspired to advocate or teach the duty or necessity of overthrowing the Government of the United States by force and violence, or

to organize or help to organize, as the Communist Party of the United States of America a society, group, or assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence, with the intent of causing the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit, nor advocated, taught, organized or helped to organize as aforesaid.

4. The evidence adduced by the prosecution was presented upon a theory based upon an erroneous construction of the Smith Act in the following respects:

(a) The evidence purports to establish that the Communist Party constitutes a conspiracy and that the charge under the indictment herein is established by showing the nature and character of the Communist Party and proving that the defendants are members thereof; such a construction of the general conspiracy statute, 18 U.S.C. 371, must be rejected in view of the fact that Congress has provided that membership in any organization which teaches or advocates the overthrow of the Government of the United States by force and violence, knowing the purposes thereof, is a separate and distinct substantive offense under the Smith Act, 18 U.S.C. 2385, a charge not made herein.

(b) Such aforesaid construction of the general conspiracy statute and of the Smith Act should be rejected [fol. 395] in view of the fact that Congress, after the adoption of the Smith Act and of the 1948 revision of the Criminal Code, has provided that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of any criminal statute. 50 U.S.C. 783(f); Internal Security Act of 1950.

5. The charge contained in the indictment herein and the evidence adduced in support thereof are in fatal variance and a conviction of the defendants under the circumstances would deprive them of their rights under the Sixth Amendment to be informed prior to trial of the true nature and cause of the accusation and would

constitute a conviction under a charge not made in violation of the due process clause of the Fifth Amendment.

(a) The indictment charges a conspiracy by the defendants on or about June 28, 1940 to commit offenses against the United States prohibited by Section 2 of the Smith Act by organizing and helping to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, while the evidence establishes that the Communist Party was either organized long before 1940 at some unidentified date or organized or re-organized in 1945.

(b) The indictment charges a conspiracy by the defendants on or about June 28, 1940 to commit offenses against the United States prohibited by Section 2 of the Smith Act by organizing and helping to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and [fol. 396] violence, while the evidence establishes that the defendants were in no way responsible for bringing the Communist Party into existence and refers solely to their alleged association with and activities as members and subordinate officers of the Communist Party.

(c) The indictment charges the defendants with conspiring to organize as the Communist Party a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, while the evidence establishes that the existence, character and purposes of the Communist Party were independent of any act or agreement on the part of defendants as individuals, and guilt is being imputed to the defendants solely on the basis of their having allegedly elected to join the Communist Party, continue as members thereof and participate in its activities.

(d) The indictment charges an offense purportedly limited to the activities of these defendants within the period from June 28, 1940 to the date of the filing of the indictment, while the evidence covers an alleged conspiracy which is more than one hundred years old and entirely without ascertainable limits of either persons or places involved.

6. (a) The evidence establishes that the prosecution is barred by res judicata as to the defendant William Schneiderman, and that the United States is, as to the defendant William Schneiderman, estopped to prosecute the indictment herein.

(b) The evidence establishes that the prosecution is barred by res judicata as to the remaining defendants who the prosecution charges were in privity with the [fol. 397] defendant William Schneiderman, and that the United States is, as to the said remaining defendants, estopped to prosecute the indictment herein.

(1). The prosecution has failed to sustain its burden of proof that the principles of Marxism-Leninism, or of the Communist Party's interpretation thereof, has changed since it was decided by the Supreme Court in *Schneiderman v. United States*, 320 U.S. 118, that advocacy of Marxism-Leninism does not constitute advocacy of the overthrow or destruction of the government of the United States by force and violence.

(2) The evidence does not differ in essential quality or nature from the evidence which the Supreme Court decided in *Schneiderman v. United States*, 320 U.S. 118, was insufficient to establish advocacy of the overthrow and destruction of the government of the United States by force and violence on the part of any individual member of the Communist Party.

7. The evidence affirmatively establishes that the indictment was not found within three years next after the alleged offense was committed.

(a) The evidence affirmatively establishes that the Communist Party of the United States of America was

organized more than three years prior to the return of the indictment.

(b) The evidence fails to establish the commission of any overt acts on the part of the defendants, or any of them, in furtherance of the alleged conspiracy and to effect the objectives thereof within three years prior to the return of the indictment.

[fols. 398-407] This motion is and will be based on Rule 29 of the Federal Rules of Criminal Procedure and all other applicable statutory and constitutional provisions, the memorandum of points and authorities in support of this motion, and upon the transcript of evidence, records, files and proceedings heretofore had herein.

Respectfully submitted, Leo Branton, Jr., Attorney for Defendants Henry Steinberg, Ben Dobbs, Carl Rude Lambert. Norman Leonard, Attorney for Defendants Loretta Starvus Stack, Ernest Otto Fox, Frank Carlson. Ben Margolis, Attorney for Defendants Albert Jason Lima, Oleta O'Connor Yates. Alexander H. Schullman, Attorney for Defendants Dorothy Healey Connelly, Philip Marshall Connelly. A. L. Wirin, Attorney for Defendants Rose Chernin Kusnitz, Al Richmond, Frank Spector. William Schneiderman, In Pro Per.

[fols. 408-441] In United States District Court

No. 22,131 Criminal

[Title omitted]

Minutes of the Court—June 9, 1952

At Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge.
Deputy Clerk: P. D. Hooser.
Reporters: A. H. Bargion, S. J. Trainor.
U. S. Att'y: Walter S. Binns (absent).
U. S. Attorney, by Asst. U. S. Attorneys: N. W. Neukom, R. H. Kinnison.

Spec. Ass't to Att'y Gen'l, USA: Lawrence K. Bailey.

Counsel for Defendants: Ben Margolis for def'ts Oleta O'Connor Yates and Albert Jason Lima.

Alexander H. Schullman for def'ts Philip Marshall Connelly, and Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey.

Leo Branton, Jr., for def'ts Henry Steinberg, Ben Dobbs, also known as Benjamin Isgur, and Carl Rude Lambert.

Norman Leonard for def'ts Loretto Starvus Stack, Ernest Otto Fox, also known as Ernest Otto Fuchs, and Frank Carlson, also known as Solomon Szkolnick.

A. L. Wirin (absent) for def'ts Al Richmond, also known as Abraham Richman, Rose Chernin Kusnitz, and Frank Efroim Spector.

Defendant William Schneiderman appearing in propria persona.

All fourteen defendants present. All sixteen jurors absent.

Proceedings: For further trial of all fourteen defendants, who are on bond.

At 11 A. M. court convenes herein, and all fourteen defendants being present, and all sixteen jurors absent, and counsel stipulating that all the defendants are present and all the jurors absent, Court orders trial proceed.

Attorney Leonard returns photostat copy of Def'ts Ex. IC which was withdrawn for purpose of photostating.

Attorney Branton argues in support of motion for judgment of acquittal.

At 11:45 A. M. Attorney Schullman argues.

Plaintiff's motion to reinstate certain stricken testimony is filed.

At 12:37 P. M. court recesses to 2 P. M. At 2:08 P. M. court reconvenes herein and all being present as before, including all fourteen defendant-, the jurors being absent, and counsel stipulating that all the defendants are present and the jurors absent, Court orders trial proceed.

Attorney Margolis argues in support of motion for judgment of acquittal.

At 3 P. M. Attorney Neukom argues in opposition to motion.

Court orders motions submitted.

At 3:08 P. M. court recesses. At 3:28 P. M. court reconvenes herein, and all being present as before, including all fourteen defendants, the jurors being absent, and counsel stipulating that all the defendants are present, and the jurors absent, Court orders trial proceed.

Attorney Kinnison argues in support of Gov't's motion to reinstate certain stricken testimony. Court denies paragraph 1, 2, 3, and 5 and grants paragraph 4.

Motions for judgment of acquittal as to all defendants are denied.

Attorney Margolis moves for a mistrial and said motion is denied by the Court.

Order striking evidence is signed and filed.

Court orders further trial continued to 11 A. M., June 10, 1952.

Edmund L. Smith, Clerk, by P. D. Hooser, Deputy Clerk.

[fol. 442] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131

[Title omitted]

ORDER STRIKING EVIDENCE—Filed June 9, 1952

The defendants by their counsel having moved the Court for an order striking certain evidence from the record, and the Court having heard respective counsel in support and opposition to the aforesaid motion to strike, and being fully advised in the premises,

It is hereby ordered that the motion to strike certain evidence be, and the same is hereby, granted, and the evidence included in the following portions of the record is stricken:

1. Page 438, lines 12 through 20;
2. Page 567, lines 7 through 11;
3. Page 568, line 17 through page 570, line 23;
4. Page 596, line 15 through page 600, line 4;
5. Page 645, line 8 through page 646, line 16;

6. Page 648, line 12 through page 649, line 15;
7. Page 654, line 11 through page 658, line 25;
8. Page 672, line 6 through page 673, line 2;
9. Page 673, lines 3 through 20;
[fol. 443] 10. Page 673, line 21 through page 675, line 10;
11. Page 704, line 19 through page 708, line 23;
12. Page 1231, lines 14 through 18;
13. Page 1242, lines 21 through 23;
14. Page 1318, line 23 through page 1319, line 2;
15. Page 1321, line 23 through page 1325, line 24;
16. Page 1551, lines 11 through 13;
17. Page 1574, line 6 through page 1577, line 13;
18. Page 1997, lines 1 through 13;
19. Page 2007, line 15 through page 2008, line 25;
20. Page 2013, line 17 through page 2014, line 4;
21. Page 2084, line 24 through page 2088, line 12;
22. Page 2092, line 20 through page 2093, line 10;
23. Page 2141, line 4 (following the word "yes") through line 8;
24. Page 2141, line 8 beginning with the word "And" through page 2145, line 16;
25. Page 2204, line 20 through page 2207, line 1;
26. Page 2209, line 8 through page 2211, line 15;
27. Page 2224, lines 4 and 5;
28. Page 2240, line 14 through page 2244, line 1;
29. Page 2247, line 23 through page 2248, line 23;
30. Page 2267, line 17 through page 2269, line 12;
31. Page 2301, line 8 through page 2303, line 20;
33. Page 2395, line 23 through page 2399, line 3;
34. Page 2399, line 19, the words "in that basement";
35. Page 2697, line 1 (following the word "yes") through page 2698, line 13;
36. Page 2821, line 20 through page 2822, line 4;
37. Page 3237, line 22 through page 3242, line 2;
38. Page 3321, line 19 through page 3322, line 21;
39. Page 3581, line 10 through page 3584, line 1;
40. Page 3596, line 21, the words "and the signature";
41. Page 3597, line 8, the name "Wm. Schneiderman";
[fol. 444] 42. Page 3773, lines 5 through 9, beginning with "In";
43. Page 3889, line 16 through page 3890, line 3;

44. Page 3913, lines 17 through 21;
45. Page 3961, line 19 through page 3966, line 4;
46. Page 4447, lines 6 through 12;
47. Page 4476, line 5 through page 4477, line 17;
48. Page 4490, line 11 through page 4495, line 6;
49. Page 4923, line 7 through page 4924, line 13;
50. Page 4939, line 24 through page 4940, line 12; beginning with the word "Jack";
51. Page 5029, line 19 through page 5030, line 22;
52. Page 5032, lines 1 through 8;
53. Page 5128, lines 7 and 8, the words "was discussed, and it was decided that blood would flow; there could be no peaceful change.";
54. Page 5367, line 1 through page 5372, line 3;
55. Page 5374, line 1 through page 5376, line 8;
56. Page 5381, line 18 through page 5382, line 13;
57. Page 5384, line 24 through page 5385, line 5;
58. Page 5431, line 15, the words "I had to burn it."
59. Page 5446, lines 12 and 13, the words "because they all came carrying the Chronicle and laughing about his death."
60. Page 5456, line 22 through page 5457, line 1;
61. Page 5463, line 8 through page 5464, line 11;
62. Page 5474, line 19 through page 5476, line 24;
63. Page 5502, line 3;
64. Page 5504, line 19 through page 5505, line 10;
65. Page 5506, line 2 through page 508, line 15;
66. Page 5512, line 25 through page 5513, line 2;
67. Page 5513, line 3 through page 5516, line 21, as to all defendants except Carlson;
68. Page 5529, lines 12 through 20;
[fol. 445] 69. Page 5530, lines 2 through 7;
70. Page 5549, line 6 through page 5553, line 20;
71. Page 5560, line 14 through page 5564, line 22;
72. Page 591, line 23 through page 5592, line 2;
73. Page 5598, line 5 through page 5599, line 6;
74. Page 6444, line 8 through page 6448, line 23;
75. Page 6458, line 2 through page 6461, line 16;
76. Page 6461, line 23 through page 6463, line 9;
77. Page 6481, lines 6 through 13;
78. Page 6481, line 14 through page 6482, line 11;

79. Page 6487, lines 20 through 23;
80. Page 6488, line 21 through page 6489, line 19;
81. Page 6697, line 2 through page 6698, line 4;
82. Page 6832, lines 9 through 17;
83. Page 7512, line 21 through page 7513, line 11;
84. Page 7621, lines 15 through 17;
85. Page 7685, line 18 through page 7687, line 4;
86. Page 7688, lines 8 through 21;
87. Page 7699, lines 3 through 5;
88. Page 7723, line 10 through page 7724, line 19;
89. Page 7802, line 9, beginning with the word "I";
90. Page 7802, lines 11 through 14;
91. Page 7815, lines 4 through 8;
92. Page 7819, lines 13 through 23;
93. Page 7820, lines 3 and 4, the words "and she had had a great privilege by talking with Molotov.";
94. Government Exhibit No. 62;
95. The signature only from Government Exhibit No. 193;
96. Government Exhibit No. 325;
97. The signature only from Government Exhibit No. 351;
98. Government Exhibit No. 657;
99. Government Exhibit No. 664;
[fol. 446-507] 100. Government Exhibit No. 666;
101. Government Exhibit No. 684;
102. Government Exhibit No. 688;
103. Government Exhibit No. 703;
104. Government Exhibit No. 717;
105. Government Exhibit No. 719;
106. Government Exhibit No. 720.

All other pending motions of the defendants to strike from the evidence are hereby denied.

Wm. C. Mathes, United States District Judge.

Received copy of the within Order this 9th day of June, 1952 and approved as to form.

Walter S. Binns, United States Attorney, by Roy H. Kinnisen, Attorney for Plaintiff.

[fol. 508] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 22131 CD

AFFIDAVIT OF WILLIAM SCHNEIDERMAN IN SUPPORT OF MOTION FOR MISTRIAL AS MADE ON JUNE 9, 1952 (REP. TR. VOL. 74, P. 9993, L. 18-25, INCL. AND P. 9994, L. 1-12, INCL.—Filed June 19, 1952

STATE OF CALIFORNIA,
County of Los Angeles, ss.

William Schneiderman, being duly sworn according to law, deposes and says:

1. That he is one of the Defendants in the above entitled action;

2. That on June 9, 1952, after all the Motions for Judgments of Acquittal had been submitted, the Honorable William C. Mathes, Judge presiding, in denying said Motions, made the statement, as appearing in Reporter's Transcript of Proceedings, June 9, 1952, Volume 74, commencing at page 9986, line 10, to and including page 9988, line 24, as follows:

> "The Court: On the motions for judgment of acquittal, I might say preliminarily that because of the cases I cited to counsel a few days ago, I don't give the effect to the presumption of innocence which counsel for the [fol. 509] defense would seem to urge the court to give with respect to every bit of evidence. As I understand the presumption of innocence, it means that the defendant is presumed innocent of any crime. He starts a trial on a charge with a clean slate and there is no evidence against him with respect to that charge except what is offered in court and it becomes the evidence in the case.
>
> "Rule 29-A directs the court to direct the entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. Application of the rule at the

present stage of this case presupposes the jury has returned a verdict of guilty based on the evidence thus far adduced, which is the prosecution's case in chief, and requires the trial judge to review this evidence and determine whether a jury might reasonably base a finding of guilty thereon. This determination necessarily involves three steps.

"First, a finding of every fact which the jury might reasonably find from the evidence in support of such a verdict.

"Second, finding every fact which the jury might reasonably infer from all facts which the jury might reasonably find from the evidence to have been proved.

"In other words, to the facts which the jury might reasonably find to have been proved, we must add all inferences which the jury might reasonably draw from facts which have been proved, to support that verdict.

"Finally, this determination involves consideration of whether all facts favoring conviction as shown by the evidence, plus all facts which reason permits to be inferred therefrom are sufficient to enable the jury to find guilt to a moral certainty of the charge, which is [fol. 510] guilt beyond a reasonable doubt.

"I don't think it would be proper for me at this time to comment upon the evidence further than to say that while membership and the holding of office in the Communist Party are declared by Congress not to be criminal per se, that means, of course, in and of itself, it seems *to* fair to say that the evidence here permits the reasonable inference, first, that the ultimate goal of the Communist Party is socialism and that the Communist Party is an organization which advocates the duty and necessity of the overthrow of the government of the United States by force and violence in order to achieve that ultimate goal, and permits the further inference in the bound of reason that the party intends to accomplish that result as speedily as circumstances permit.

"The evidence here also permits a reasonable inference that a majority of the members of the party or, probably more accurately, at least, the dominant mem-

bers of the party, embrace and support that objective and that method of achieving the objective.

"The evidence here in this case permits the reasonable inference that these defendants are members of the Communist Party of the United States of varying degrees of standing and activity.

"From that fact, it would be reasonable to infer under all the circumstances the jury might reasonably infer that the defendants embrace the doctrine and subscribe to the view that advocates the duty and necessity of overthrowing the government of the United States by force and violence as speedily as circumstances permit.

"From their membership in the Communist Party and the activities shown, the jury might infer at the [fol. 511] outside such concert of action as is described as a conspiracy, the conspiracy specifically which is charged in the indictment.

"For those reasons, briefly, the motions as to all defendants for judgment of acquittal will be denied.

"Of course, pursuant to the rule, the motions may be renewed by any defendant upon the close of all the evidence in the case."

3. That during the proceedings in the above entitled matter on June 9, 1952, in said Volume 74 of the Reporter's Transcript, at page 9993, commencing with line 18, to and including page 9994, line 12, in behalf of all of the Defendants, a Motion for Mistrial was made, which Motion in said Transcript appears as follows:

"Mr. Margolis: I also move for a mistrial upon the grounds that under the conditions prevailing in this period of time, where because of the degree of feeling that there is utilized by the press, such a large section of the press, for the purpose of stirring up hatred against persons who are members of the *Community* Party, that remarks of your Honor indicating that there might be sufficient evidence is tantamount to a jury, under the present conditions, to an invitation to convict, I am not talking about your Honor's convictions; I am talking about the effect.

"The Court: Do you wish the remarks I have made stricken?

"Mr. Margolis: It would not accomplish anything, your Honor.

"The Court: They won't be a matter of public record. They won't be printed if they are stricken.

"Mr. Margolis: The press can still report them, [fol. 512] that they were made, although they were stricken. Therefor- I see no useful purpose to be offered by striking them. I submit the irreparable damage has been committed.

"The Court: The motion will be denied, Mr. Margolis."

4. That affiant, on June 10, 1952, read the Los Angeles Examiner of June 10, 1952, Section Three, Page 1, under the caption, "14 Reds Lose Acquittal Plea", a true and correct copy of said article is attached hereto, made part hereof and marked Exhibit "A".

5. That on June 10, 1952, affiant read The Mirror of June 10, 1952, at Page 23, under the caption, "14 Cal. Communists' Defense Opens Today in Federal Court", a true and correct copy of said article is attached hereto, made part hereof and marked Exhibit "B".

6. That on June 10, 1952, affiant read the Los Angeles Herald & Express of June 10, 1952, Page A-14, under the caption, "Defense Set for Reply", a true and correct copy of said article is attached hereto, made part hereof and marked Exhibit "C".

7. That on June 10, 1952, affiant read the Los Angeles Times of June 10, 1952, Part I, Page 23, under the caption, "Acquittal Pleas Denied in Trial of Red Leaders", a true and correct copy of said article is attached hereto, made part hereof and marked Exhibit "D".

8. That on June 10, 1952, affiant read the Daily News of June 10, 1952, at Page 4, under the caption, "14 to Begin Defense in Red Trial", a true and correct copy of said article is attached hereto, made part hereof and marked Exhibit "E".

William Schneiderman.

Subscribed and sworn to before me this 18th day of June, 1952.

Mary L. Rosenfield, Notary Public in and for said County and State.

My Commission Expires Jan. 15, 1955.

[fol. 513] EXHIBIT "A"

Los Angeles Examiner

Los Angeles,
Tuesday, June 10, 1952.

14 Reds Lose Acquittal Plea

Court's Ruling Clears Way for Defense Testimony

Motions for directed verdicts acquitting William Schneiderman and 13 other California Communist leaders were denied by Judge William C. Mathes in Federal Court late yesterday.

Action opened the way for commencement of the defense today, with opening statements by Attorneys Alex H. Schullman and Norman Leonard the first move.

In denying the motions Judge Mathes rejected defense contention that the Government had failed to prove Smith Act charges that the 14 conspired to teach violent revolution.

Evidence

The court noted that membership in the Communist Party or holding a party office is no crime, but observed that:

"The evidence here has been that the ultimate goal of the Communist Party is Socialism and the inference has been that the party teaches the necessity of achieving that goal as speedily as possible."

Judge Mathes added that evidence had been offered that the party advocated violent action if necessary, and said that:

"The case involves dominant members of the Communist Party. . . . It is reasonable to assume from the evi-

dence that they embraced the doctrine of the duty and necessity of overthrowing the Government by force and violence. . . ."

Unusual Request

Attorney Schullman then made an extraordinary request that the press refrain from reference to the comments of the court lest they influence the jury.

Judge Mathes pointed out, however, that jurors are admonished to refrain from discussing a case on trial or reading anything about it.

Attorney Ben Margolis, also of the five-man defense counsel, renewed a previous motion for mistrial on general grounds, which was again denied.

[fol. 514] EXHIBIT "B"

The Mirror

Los, Angeles,
Tues., June 10, 1952.

14 Cal. Communists' Defense
Opens Today in Federal Court

A motion of acquittal denied them, 14 California Communist leaders return to Federal court today to begin presentation of their own defense.

Judge William C. Mathes yesterday climaxed nearly three weeks of legal arguments by denying motions for judgment of acquittal for all defendants.

In making his ruling, the judge held that while membership or office-holding in the Communist Party is not criminal per se, "it is fair to say that evidence here permits a reasonable inference that the ultimate goal is Socialism."

Advocate Force

Further, he said, the Communist Party, as organized, "advocates overthrow of the government by force and violence and as speedily as circumstances permit," which is the essence of the Smith Act indictment against the 14.

The evidence here permits a reasonable inference that the defendants are members of the Communist Party in

good standing," the judge went on, "and it is reasonable to infer the defendants embraced the doctrines of the Communist Party."

Atty. Ben Margolis objected to the judge's explanation of his ruling on grounds it might reach the eyes of the jurors, who had been excused since May 22.

"They're not supposed to read the newspapers," the judge replied. He offered to have his remarks stricken.

Whereupon, Margolis asked for a mistrial on grounds the judge's explanation might influence the jury's decision. It was denied.

Today, Attys. Alexander H. Schullman and Norman Leonard will make their opening remarks to the jurors in behalf of their respective defendants. They had waived opening statements until completion of the government's case.

Schullman represents Dorothy Healey, Los Angeles County chairman, and Philip M. Connelly, Los Angeles editor of the People's World. Leonard represents Loretta Starvus Stack, Ernest Otto Fox, both of San Francisco, and Ben Dobbs of Los Angeles.

Other defendants are William Schneiderman, State chairman; Henry Steinberg, Carl R. Lambert, Frank Carlson, Al Richmond, Rose Chernin Kusnitz, Frank Spector, Albert J. (Mickie) Lima and Oleta O'Connor Yates.

Initial defense testimony will come tomorrow, and court then will recess until Monday because Judge Mathes must attend a judicial conference.

U.S. Atty. Walter S. Binns also is absent, attending a conference of United States Attorneys in Washington, while Atty. A. L. Wirin also is in the East on legal affairs.

[fol. 515] EXHIBIT "C"

Los Angeles Herald & Express

Tuesday, June 10, 1952.

L. A. Red Trial

Defense Set for Reply

Attorneys for 14 California Communist leaders today started marshaling their witnesses as the aftermath of the refusal of Federal Judge William C. Mathes to direct verdicts of acquittal in behalf of any of the defendants.

The judge's ruling came after several days of involved legal arguments which came to a close yesterday afternoon.

In effect, the judge's ruling held that sufficient evidence had been presented by the government's 16 weeks of trial to assure continuance of the trial to let the jury decide as to the guilt or innocence.

"From the government's evidence and in the absence of defense evidence, the jury reasonably could draw the inference that the ultimate goal of the Communist Party is socialism," the judge said, "and that the Communist Party advocates the duty and necessity to overthrow the government by force and violence to achieve this goal as speedily as circumstances permit.

"The jury could reasonably draw the inference that the defendants are members of the party and embrace this doctrine in the light of the government's case to date."

[fol. 516] EXHIBIT "D"

Los Angeles Times

Tuesday, June 10, 1952.

Part I

Acquittal Pleas Denied in Trial of Red Leaders

Defense Attorneys to Open Arguments, but Their Strategy Plan Remains Undisclosed

U.S. Judge William C. Mathes yesterday denied defense motions for a directed verdict of acquittal in the trial of

14 California Communist Party leaders on charges of conspiracy to teach and advocate the violent overthrow of the U.S. Government.

Following written orders on further motions to strike certain parts of the testimony of the 22 government witnesses who testified for the prosecution, Defense Attys. Norman Leonard and Alexander Schullman will make their opening statements and the defense is scheduled to begin presenting witnesses.

None of the five defense attorneys would indicate in advance just what their strategy will be or what witnesses will be presented.

In denying motions for directed verdicts of acquittal, Judge Mathes said the government had presented sufficient evidence to indicate up to the present time that the ultimate goal of the Communist Party was Socialism and that it could be inferred that the Communist Party advocated the violent overthrow of the United States government to achieve that end.

He also said that the evidence links the defendants, as dominant members of the Communist Party here, and indicates that they supported that inference.

[fols. 517-573] EXHIBIT "E"

Daily News

Los Angeles,
Tuesday, June 10, 1952.

14 to Begin Defense in Red Trial

Fourteen accused Communists today were to begin presentation of their defense to charges of conspiracy after Federal Judge William C. Mathes refused to grant motions for directed verdicts of acquittal.

The case for the defense was to open with statements by attorneys Alexander Schullman and Norman Leonard on behalf of the 14 defendants who are charged with conspiring to teach and advocate the necessity for forceful overthrow of the government.

The last two weeks have been taken up in involved legal

argument over testimony presented by the government, and over defense motions for directed verdicts of acquittal.

Judge Mathes will instruct the jury, when it returns to court today, on what sections of testimony must be ignored, having been stricken from the record of the 19 weeks of proceedings.

In explaining why he refused to grant the motions for acquittal Judge Mathes created a minor furor among defense counsel with his remarks.

Judge Mathes said, "While membership in the Communist party, as declared by Congress, is not a criminal offense per se, there is reasonable inference from the evidence presented by the government from which the jury might conclude that the goal of the Communist party is socialism and there is also reasonable inference that the Communist party has the goal and purpose of bringing this about by overthrowing the government by force and violence as speedily as circumstances permit."

The judge pointed out that the jury might arrive at this conclusion from the government's case alone and in the absence of any contrary testimony from the defendants.

Schullman, admitting he did not know how to phrase his request, finally asked that the newspapers not publish the court's remarks because the jurors might read them and conclude that the judge had implied he believed the defendants guilty, even though the trial was not over.

Judge Mathes asked whether the attorney wanted the court's remarks stricken from the record. Schullman said he did not.

Judge Mathes said jurors are not supposed to read newspaper reports of the case and added "that while an inference might be drawn by the jurors as to the guilt of the defendants from the evidence thus far, they could likewise make an inference from the same evidence that the defendants were not guilty."

Attorney Ben Margolis' motion for a mistrial on the grounds that the court's remarks would prejudice the jury was denied.

[fols. 574-580] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 22131-CD Crim.

ORDER TO REINSTATE CERTAIN STRICKEN TESTIMONY—Filed July 9, 1952

Plaintiff, through its counsel, having moved the Court for an order reinstating certain evidence heretofore stricken from the record, and the Court having heard respective counsel in support and in opposition to the aforesaid motion, and being fully advised in the premises;

It is hereby ordered that the motion to reinstate the testimony of the Witness John Lautner in Volume 18, page 2334, line 14, to page 2335, line 5, of the Transcript be and the same is hereby granted and the evidence there included is reinstated in the record.

It is further ordered that in all other respects said motion be and the same is hereby denied.

Dated this 9th day of July, 1952.

Wm. C. Mathes, United States District Judge.

RHK:aa Approved as to form. Norman Leonard.

[fol. 581] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 22131 CD

ORDER STRIKING EVIDENCE—Filed July 22, 1952

The defendants by their counsel having moved the Court for an order striking certain evidence from the record, and the Court having heard respective counsel in support and

opposition to the aforesaid motion to strike, and being fully advised in the premises,

It is hereby ordered that the motion to strike certain evidence be, and the same is hereby, granted, and the evidence included in the following portions of the record is stricken:

107. Page 1164, line 1 through page 1170, line 25;
108. Page 1996, lines 14 through 19;
109. Page 2319, line 7 through page 2320, line 23;
110. Page 3250, line 23 through page 3251, line 11;
111. Page 3252, line 23 through page 3253, line 8;
112. Page 3580, line 7: The words "William Schneiderman".
113. Page 3580, line 9 through page 3581, line 3;
114. Page 3612, line 22: The words "Henry Winston".
[fol. 582] 115. Page 4000, line 13 through page 4003, line 7;
116. Page 4004, line 7 through page 4006, line 17;
117. Page 4221, line 24 through page 4225, line 23;
118. Page 4648, line 8 through page 4649, line 9;
119.
120. Page 4920, line 19 through page 4923, line 6;
121. Page 4927, line 9 through page 4929, line 11;
122. Page 4938, lines 8 through 9: The words, "The original had to be turned in to the party when we received the 1948 cards, and";
123. Page 4959, line 16, beginning with the words "And finally" to line 23, ending with the word "quote";
124. Page 4971, lines 20 through 21: The words "but it would be best to destroy.";
125. Page 5081, line 18 through page 5085, line 3;
126. Page 5108, lines 9 through 10;
127. Page 5111, lines 14 through 18;
128. Page 5601, line 1 through page 5602, line 18, as to all defendants, except the defendant Ben Dobbs;
129. Page 5760, lines 13 through 18;
130. Page 5786, line 11 through page 5787, line 9;
131. Page 5787, line 10 through page 5790, line 25;
132. Page 6616, line 1 through page 6619, line 1;
133. Page 7460, line 24 through page 7461, line 4;
134. Page 7462, lines 8 through 14;
135. Page 7463, lines 16 through 19;
136. Page 7465, lines 21 through 24;

137. Page 702, line 16 through page 704, line 18;

138. Page 971, line 14;

139. Page 981, lines 8 through 9: The words "It may have been the Soviet Union constitution.";

[fol. 583] 140. Page 1237, line 24 through page 1238, line 14;

141. Page 2004, line 15, beginning with the word "which" to line 19, ending with "L-o-z-o-f-s-k-y.";

142. Page 2342, lines 23 through 25;

143. Page 3906, line 22 through page 3925, line 14;

144. Page 3927, line 19 through page 3933, line 16;

145. Page 3934, line 4 through page 3935, line 11;

146. Page 3936, line 15 through page 3937, line 20;

147. Page 4477, line 18 through page 4478, line 23;

148. Page 4482, lines 10 through 15;

149. Page 5071, lines 8 through 9: The words "since they advocated the violent overthrow of the government.";

150. Page 5349, lines 7 through 8;

151. Page 5499, lines 2 through 14;

152. Page 5554, lines 18 through 24;

153. Page 5584, line 25 through page 5585, line 18;

154. Page 5794, lines 5 through 19;

155. Page 6008, lines 3 through 6: The words "but I was part and parcel of a plot to prepare a revolution, and that everything I did and that the leading class did from day to day was part of the plot of pushing forward to this revolution.";

156. Page 6030, lines 12 through 14: The words "because they haven't told you the whole story. The Communist Party won't talk.";

157. Page 6035, lines 4 through 14;

158. Page 6110, lines 15 through 21;

159. Page 6116, line 3, beginning with the words: "We had" to line 7, ending with the word "one";

160. Page 6314, lines 2 through 20;

161. Page 6440, lines 2 through 3;

162. Page 7604, line 4 through page 7606, line 24;

[fols. 584-629] 163. Page 7806, lines 11 through 12: The words "And she said, 'Well, they don't make books and put paper into them like this in America.' ";

164. Page 7928, lines 24 through 25: The words "Well, he was practicing law for the Communist Party.";

165. Page 7998, line 17: The words "The native sons stayed later.";

166. Page 8063, lines 23 through 25;

167. Page 8404, line 1, beginning with the word "who" to line 4, ending with the words "New York";

168. Page 12,080, line 11 through page 12,081, line 9;

169. Government Exhibit #485, as to all defendants except the defendant Ben Dobbs;

170. Government Exhibit # 305;

171. Government Exhibit # 404.

Done in Open Court July 15, 1952.

Wm. C. Mathes, United States District Judge.

Received copy of the within Order this — day of July, 1952 and approved as to form.

Walter S. Binns, United States Attorney. By Ray H. Kinnison, Attorney for Plaintiff.

[fol. 630] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 22,131 Criminal

MINUTES OF THE COURT—July 30, 1952

At Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge;

Deputy Clerk: P. D. Hooser. Reporters: S. J. Trainor, A. H. Bargion;

U. S. Att'y: Walter S. Binns;

U. S. Attorney, by Ass't U. S. Att'ys: N. W. Neukom, R. H. Kinnison;

Spec. Ass't to Att'y Gen'l USA: Lawrence K. Bailey;

Counsel for Defendants: Ben Margolis for deft's Oleta O'Connor Yates and Albert Jason Lima;

Alexander H. Schullman for def'ts Philip Marshall Connelly and Dorothy Healey Connelly; charged as Dorothy Rosenblum Healey;

Leo Branton, Jr., for def'ts Henry Steinberg, Ben Dobbs, also known as Benjamin Isgur, and Carl Rude Lambert;

Norman Leonard for def'ts Loretta Starvus Stack, Ernest Otto Fox, also known as Ernest Otto Fuchs, and Frank Carlson, also known as Solomon Szkolnick;

A. L. Wirin for def'ts Al. Richmond, also known as Abraham Richman, Rose Chernin Kusnitz, and Frank Efroim Spector;

Defendant William Schneiderman appearing in propria persona.

All fourteen defendants present. All sixteen jurors present at 11:30 AM.

Proceedings: For further jury trial of all fourteen defendants, who are on bond, except Def't Yates, who is in custody.

Court convenes herein at 11 AM, all fourteen defendants present, all sixteen jurors absent, and counsel so stipulating,

Defendant Schneiderman moves for a mistrial and makes a statement relative thereto. Defts' Ex. NE is marked for ident. Attorney Schullman joins in said motion. Defts' Ex. NE, first 20 pages of Los Angeles Times for July 30, 1952, is received into evidence.

Attorney Leonard moves that proceedings be suspended until written motions can be filed by defendants and ruled upon.

Each of Attorneys Margolis, Binns, Wirin, and Schullman, respectively, makes a statement.

Motion to suspend is denied. The jury is summoned.

At 11:30 AM the jury is brought into court and Attorney Neukom resumes argument, it being stipulated that the jury is present.

At 12:23 PM Court admonishes the jurors not to discuss this cause and declares a recess to 1:45 PM.

At 2:05 PM court reconvenes herein and all being present as before, including all fourteen defendants and all sixteen jurors, and counsel stipulating that all the defendants and jurors are present, Court orders trial proceed.

Attorney Neukom resumes argument.

At 3:05 PM Court admonishes the jurors and declares a recess.

At 3:20 PM court reconvenes herein and all being present

as before, including all the defendants and jurors, and counsel stipulating that all the defendants and jurors are present, Court orders trial proceed.

Attorney Neukom resumes argument.

Attorney Leonard moves for a mistrial and Court denies said motion.

Attorney Margolis moves for a mistrial and Court denies said motion.

At 4:15 PM Court admonishes the jurors and declares a recess. It is stipulated that the jurors have left the court room and defendants remain.

Attorney Wirin makes a statement.

[fol. 631] At 4:19 PM Court declares a recess. At 4:32 PM court reconvenes herein and all being present as before, except the jurors, all the defendants being present, and counsel so stipulating, Court orders trial proceed.

Attorney Branton makes a statement.

At 4:40 PM the jury is summoned into court, and it being stipulated that all the jurors are present, Attorney Neukom resumes argument.

At 5 PM Court admonishes the jurors not to read newspapers or listen to radio, etc., in addition to the usual admonition not to discuss this cause, and excuses the jurors until 1:30 PM, July 31, 1952.

Court declares a recess herein to 11 AM, July 31, 1952, for further jury trial.

Edmund L. Smith, Clerk, by P. D. Hooser, Deputy Clerk.

[fol. 632] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 22131—Criminal

MINUTES OF THE COURT—July 31, 1952

At: Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge.
Deputy Clerk: P. D. Hooser.
Reporters: A. H. Bargion, S. J. Trainor.
Counsel for the Plaintiff: Walter S. Binns, U.S. Atty.;

Norman W. Neukom, Ray H. Kinnison, Asst. U.S. Attys.; Lawrence K. Bailey, Spec. Asst. to Atty. Gen.

Counsel for the Defendants: Ben Margolis, for Oleta O'Connor Yates and Albert Jason Lima;

Alexander H. Schullman, for Philip Marshall Connelly and Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey;

Leo Branton, Jr., for Henry Steinberg, Ben Dobbs, aka Benjamin Isgur, and Carl Rude Lambert;

Norman Leonard, for Loretta Starvus Stack, Ernest Otto Fox, aka Ernest Otto Fuchs, and Frank Carlson, aka Solomon Szkolnick;

A. L. Wirin, for Al Richmond, aka Abraham Richman, Rose Chernin Kusnitz and Frank Efroim Spector;

Defendant William Schneiderman, appearing in propria persona.

Proceedings: Further jury trial of the above-named 14 defendants who are on bond, except defendant Yates, who is in custody.

It is stipulated that the jury is absent and the defendants present. Government's exhibit 750-C is marked for identification. Defendants' exhibits NF and NG are received into evidence in support of motion for mistrial only.

Defendants' exhibit NE is withdrawn.

Attorney Schullman argues in support of motion for mistrial.

Attorney Branton argues in support of the motion.

Attorney Margolis argues in support of the motion.

At 12:38 PM. the Court recesses to 1:30 PM. without jury.

At 1:52 PM. the Court reconvenes without jury and defendants are present. Attorneys Leonard, Binns, make statement regarding motion for mistrial. Defendants' exhibit NH is marked for identification. The Court refuses instructions.

Motions for mistrial are denied.

Defendants' exhibits NC1, NC2 and NC3 are marked for identification.

At 2:30 PM. the jury is brought in and the Court instructs the jury.

At 3:05 PM. the jury is admonished and recesses.

At 3:17 PM. the Court reconvenes and all are present

including the jury. The Court resumes instructing the jury.

At 3:53 PM. the jury is admonished and excused for recess. The jury left the room and the defendants remain. Attorney Leonard and the Court discuss defendants' objections to instructions.

At 4:18 PM. the jury returns to the Courtroom and so stipulate.

At 4:20 PM. John M. Scheibe, W. S. Sweeney, Floyd O. Strong, Mary L. Ross and Maude Purdy are sworn to care for the jury.

Bailiffs ordered to take the jury to supper at 5:30 PM. at Government expense.

Alternate jurors Ahne Izen, Lillian Cohen, Alfred Murray and Elsa M. Jansson are admonished and excused under certain conditions until further orders.

[fol. 633] MINUTES OF THE COURT: Jury Trial Criminal —Page 2

The jury and alternates have retired from the Courtroom and the defendants remain.

The Counsel are requested to stipulate as to all exhibits in evidence and to furnish a list of said exhibits.

Defendants' exhibit MZ-2 is marked for identification.

The instructions given to the jury are filed.

At 5:30 PM. the jury is taken to supper accompanied by bailiffs Sweeney, Scheibe, Ross and Purdy.

At 7:15 PM. the jury returned to the juryroom.

At 9:00 PM. the jury is ordered taken to Hotel Rosslyn for the night and to breakfast tomorrow morning.

IT IS ORDERED that the cause is continued to August 1, 1952, 10 AM. for further trial.

Edmund L. Smith, Clerk, By P. D. Hooser, Deputy Clerk.

[fol. 634-648] In United States District Court

[Title omitted]

No. 22131—Criminal

Minutes of the Court—August 5, 1952

At Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge.
Deputy Clerk: P. D. Hooser.
Reporter: A. H. Bargion.
U. S. Attorney: Walter S. Binns.
Counsel for Plaintiff: Norman W. Neukom, Ray H. Kinnison, Asst. U. S. Attorneys.
Counsel for Defendant: Lawrence K. Bailey, Spec. Asst. to the Atty. Gen. Ben Margolis, for Oleta O'Connor Yates, Albert Jason Lima; Alexander H. Schillman (absent), for Philip Marshall Connelly, Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey;
Leo Branton, Jr., for Henry Steinberg, Ben Dobbs, aka Benjamin Isgur, Carl Rude Lambert;
Norman Leonard, for Loretto Starvus Stacks, Ernest Otto Fox, aka Ernest Otto Fuchs, Frank Carlson, Aka Solomon Szkolnick;
A. L. Wirin, for Al Richmond, aka Abraham Richman, Rose Chernin Kusnitz, Frank Efroim Spector;
William Schneiderman, appearing in pro. per.
Proceedings: Further trial of the above-named 14 defendants who are present on bond except defendant Yates who is present in custody.
Jury is deliberating. To jury room at 9:30 AM.
At 11:38 AM all present except the jury and so stipulate note from foreman read by the Court and ordered filed stating that the jury has reached a verdict.
At 11:40 AM. the jury brought in the Courtroom and so stipulate Court asks foreman if—has reached a verdict and foreman replies they have and a separate verdict of guilty as to each defendant is presented and ordered read and is read by the Clerk. Each juror is polled separately as to each defendant and confirms the verdict of guilty as his or her verdict. The verdicts are ordered filed. The verdicts are filed.

The Court makes a statement to the jury and reads Title 18, Sec. 1503 to the jury. Every person in the courtroom, their agents, servants, etc., is enjoined from interfering in any way with any juror.

At 12:15 PM. the jury is excused from further service until further call, but not discharged. 4 alternate jurors are now discharged.

Attorney Schullman requests defendants be allowed to remain on bond until hearing on pending motions for judgment of acquittal.

Attorney Binns objects to request of Attorney Schullman.

The Court directs that no presentence investigation or report be made by the Probation Officer.

The defendants are ordered remanded to the custody of Marshal and bail exonerated, to be returned to Court tomorrow morning. The Court makes an oral order regarding all defendants as heretofore made on June 30, 1952 regarding defendant Yates.

At 12:42 PM. the Court recesses to 11 AM., August 6, 1952.

Edmund L. Smith, Clerk, By P. D. Hooser, Deputy Clerk.

[fol. 649] IN UNITED STATES DISTRICT COURT

No. 22131-Crim.

[Title omitted]

MINUTES OF THE COURT—August 6, 1952

At: Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes District Judge.
Deputy Clerk: P. D. Hooser.
Reporters: Jack D. Ambrose, A. H. Bargion.
U.S. Attorney: Walter S. Binns.
Counsel for Plaintiff: Norman W. Neukom, Ray H. Kinnison, Asst. U.S. Attys.
Lawrence K. Bailey, Spec. Asst. to the Atty. Gen.;

Counsel for Defendant: Ben Margolis, for Oleta O'Connor Yates, Albert Jason Lima;

Alexander H. Schullman, for Philip Marshall Connelly, Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey;

Leo Branton, Jr., for Henry Steinberg, Ben Dobbs, aka Benjamin Isgur, Carl Rude Lambert;

Norman Leonard, for Loretta Starvus Stack, Ernest Otto Fox, aka Ernest Otto Fuchs, Frank Carlson, aka Solomon Szkolnick;

A. L. Wirin, for Al Richmond, aka Abraham Richman, Rose Chernin Kusnitz, Frank Efroim Spector;

Defendant William Schneiderman, appearing in pro. per.

Proceedings: Further proceedings; defendants present in custody.

At 11:20 AM. defendants are present with counsel.

Robert Morris of American Civil Liberties Union makes a statement.

Attorney Leonard argues in support for judgment of Acquittal on behalf of all defendants.

Attorney Wirin argues in support of motions for judgment of acquittal as to all defendants.

At 12:30 PM. recess to 1:45 PM.

At 1:58 PM. the Court reconvenes and all are present including defendants.

Attorney Branton argues in support of motion for judgment of acquittal.

At 2:08 PM. Attorney Margolis argues in support of motion.

At 2:45 PM. Attorney Schullman argues in support of motion.

At 3:03 PM. recess. At 3:30 PM. the Court reconvenes and all present as before.

Defendant Schneiderman argues in support of motion. The Government submits the matter on the basis of argument previously made. Motions stand submitted.

Motion in arrest of judgment served and filed.

Motion for new trial served and filed.

Motion in behalf of all defendants for leave of their counsel to interview the jury after verdict is served and filed.

Motion in arrest of judgment is denied.

Motion in behalf of all defendants for leave of their counsel to interview the jury after the verdict is denied.

Motion for new trial submitted along with pending motion for judgment of acquittal.

Order to Marshal signed by the Court with respect to permitting defendants to consult with counsel and is filed.

Ruling on pending motions is continued to 11 AM. tomorrow, August 7, 1952.

The Court adjourns at 3:50 PM.

Edmund L. Smith, Clerk, by P. D. Hooser, Deputy Clerk.

[fol. 650] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131 CD

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed August 6, 1952

To the United States of America, plaintiff, and to Walter S. Binns, United States Attorney, its Attorney:

Please take notice that the defendants Frank Carlson, Philip Marshall Connelly, Ben Dobbs, Ernest Otto Fox, Dorothy Healey Connelly, Rose Cherrin Kusnitz, Carl Rude Lambert, Albert Jason Lima, Al Richmond, William Schneiderman, Frank Spector, Loretta Starvus Stack, Henry Steinberg and Oleta O'Connor Yates, and each of them, moves the Court for an order in arrest of judgment upon the following ground:

1. The indictment herein does not state facts sufficient to constitute an offense against the United States.

This motion is and will be based upon Rule 34 of the Federal Rules of Criminal Procedure, the memorandum of points and authorities annexed hereto, and upon the

[fols. 651-652] transcript of evidence, records, files and proceedings herein.

Respectfully submitted, Leo Branton, Jr., Attorney for Defendants Henry Steinberg, Ben Dobbs, Carl Rude Lambert; Norman Leonard, Attorney for Defendants Loretta Starvus Stack, Ernest Otto Fox, Frank Carlson; Ben Margolis, Attorney for Defendants Oleta O'Connor Yates, Albert Jason Lima; Alexander H. Schullman, Attorney for Defendants Dorothy Healey Connelly, Philip Marshall Connelly; A. L. Wirin, Attorney for Defendants Rose Chernin Kusnitz, Al Richmond, Frank Spector; William Schneiderman, In Pro Per.

[fol. 653] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 22131 CD

[Title omitted]

MOTION FOR NEW TRIAL—Filed August 6, 1952

To the United States of America, plaintiff, and to Walter S. Binns, United States Attorney, its Attorney:

Please take notice that each of the defendants, Frank Carlson, Philip Marshall Connelly, Ben Dobbs, Ernest Otto Fox, Dorothy Healey Connelly, Rose Chernin Kusnitz, Carl Rude Lambert, Albert Jason Lima, Al Richmond, William Schneiderman, Frank Spector, Loretta Starvus Stack, Henry Steinberg and Oleta O'Connor Yates, moves the Court for an order granting him or her a new trial upon the following grounds:

1. The Court erred in denying defendants' motions for judgment of acquittal made at the conclusion of the evidence presented in the prosecution's case in chief, and at the conclusion of the evidence presented in the entire case;
2. The verdict is contrary to the weight of the evidence;
3. The verdict is not supported by substantial evidence;

[fol. 654] 4. The statutes under which the defendants were indicted as construed by the Court and as applied by the Court and the jury to the evidence are unconstitutional and violate the defendants' rights of speech, press and assembly guaranteed by the First, Ninth and Tenth Amendments to the Constitution, deprive the defendants of their liberty without due process of law in violation of the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment;

5. The Court erred in sustaining objections to questions addressed to witnesses by counsel for the defendants;

6. The Court erred in admitting testimony of witnesses to which objections were made by counsel for defendants;

7. The Court erred in sustaining objections to the offer of exhibits on behalf of the defendants;

8. The Court erred in admitting exhibits over the objections of counsel for defendants;

9. The Court erred in denying defendants the opportunity to prove that the Smith Act is unconstitutional as applied;

10. The Court erred in denying the defendants' several motions for mistrial;

11. The Court erred in denying defendants' several motions to dismiss the indictment;

12. The Court erred in denying defendants' several motions to strike the testimony of the prosecution witnesses as contained in their motions to strike testimony and exhibits filed in writing during the trial;

13. The Court erred in denying defendants' request for a bill of particulars;

14. The Court erred in charging the jury and in refusing to charge the jury as requested.

This motion is and will be based upon Rule 33 of the Federal Rules of Criminal Procedure, the memorandum [fols. 655-656] of points and authorities annexed hereto, and upon the transcript of evidence, records, files and proceedings herein.

Respectfully submitted, Leo Branton, Jr., Attorney for Defendants Henry Steinberg, Ben Dobbs, Carl Rude Lambert; Norman Leonard, Attorney for Defendants Loretta Starvus Stack, Ernest Otto

Fox, Frank Carlson; Ben Margolis, Attorney for Defendants Oleta O'Connor Yates, Albert Jason Lima; Alexander H. Schullman, Attorney for Defendants Dorothy Healey Connelly, Philip Marshall Connelly; A. L. Wirin, Attorney for Defendants Rose Chernin Kusnitz, Al Richmond, Frank Spector; William Schneiderman, In Pro Per.

[fols. 657-764] IN UNITED STATES DISTRICT COURT

No. 22131-Criminal

[Title omitted]

MINUTES OF THE COURT—August 7, 1952

At: Los Angeles, Calif.

Present: The Honorable Wm. C. Mathes, District Judge.

Deputy Clerk: P. D. Hooser. Reporter: A. H. Bargion, S. J. Trainor (AT 1:45 PM.)

Counsel for Plaintiff: Walter S. Binns, US Atty., Ray H. Hinnison and Norman W. Neukom, Asst. US Attys., Lawrence K. Bailey, Spec. Asst. to the Atty Genl.

Counsel for Defendant: Ben Margolis, for Oleta O'Connor Yates, Albert Jason Lima; Alexander H. Schullman, for Philip Marshall Connelly, Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey; Leo Branton, Jr., for Henry Steinberg, Ben Dobbs, aka Benjamin Isgur, Carl Rude Lambert; Norman Leonard, for Loretta Starvus Stack, Ernest Otto Fox, aka Ernest Otto Fuchs, Frank Carlson, aka Solomon Szkolnick; A. L. Wirin, for Al Richmond, aka Abraham Richman, Rose Chernin Kusnitz, Frank Efroim Spector; Defendant William Schneiderman, appearing in pro. per.

Proceedings: Further proceedings; defendants present in custody.

All parties present including counsel and defendants.

Attorney Binns argues in opposition to motion for Judgment of Acquittal. Attorney Margolis argues in support of motion in reply to Atty Binns. Attorney Binns argues.

Atty. Schulman argues. Atty Wirin argeus, Atty Neukom argues. At 12:33 PM. the Court recesses to 1:45 PM. At 1:50 PM. the Court reconvenes and all are present as before.

Atty Leonard argues. Atty. Neukom argues. Atty. Margolis argues. Atty. Schullman argues. The Court makes a statement.

The Court denies motion for Judgment of Acquittal.

Defendants' motion for Leave to Interview Jury after verdict filed August 6, 1952 is marked for identification as defendants' exhibit NJ. Defendants' exhibits NF, NG and NJ are deemed as being incorporated in defendants' motion for a new trial.

Motion for a new trial is denied.

Atty. Wirin makes a statement on behalf of all defendants prior to sentence. The Defendants are ready for sentence. At 2:53 PM. the Court recesses and at 3:06 PM. the Court reconvenes and all are present.

It is adjudged that defendants Oleta O'Connor Yates; Albert Jason Lima; Philip Marshall Connelly; Dorothy Healey Connelly, charged as Dorothy Rosenblum Healey; Henry Steinberg; Ben Dobbs aka Benjamin Isgur; Carl Rude Lambert; Loretta Starvus Stack; Ernest Otto Fox aka Ernest Otto Fuchs; Frank Carlson aka Solomon Szkolnick; Al Richmond aka Abraham Richman; Rose Chernin Kusnitz; Frank Efroim Spector; and William Schneiderman are hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, and shall pay to the United States of America a fine of Ten Thousand Dollars for the offense charged in the indictment; and be further imprisoned until said fine is paid or he is otherwise discharged as provided by law.

It is further adjudged that the term of imprisonment herein imposed on defendant Oleta O'Connor Yates shall run concurrently with the period of imprisonment here imposed upon the defendant Oleta O'Connor Yates for civil contempt on June 26, 1952, in civil proceeding No. 14291, pending in this court.

It is adjudged that bail of the defendants is exonerated.

Notice of Appeal as to each defendant is filed. Atty. Schullman applies for bail pending appeal in amounts as heretofore set for each defendant in this case. At 5:15 PM.

the Court recesses. At 5:35 PM. the Court reconvenes and all present. Counsel argue. The Court denies application for bail pending appeal. Defendant Yates is ordered to return to Court tomorrow at 11 AM. for further proceedings regarding criminal contempt.

Edmund L. Smith, Clerk. By P. D. Hooser, Deputy Clerk.

7:22 P. M. adjourn.

[fols. 765-766] MINUTE ENTRIES OF ARGUMENT AND SUBMISSION—July 12 and 14, 1954 (Omitted in Printing)

[fol. 767] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 17, 1955

Ordered that the typewritten opinion this day rendered by this Court in above causes be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 768] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,480

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, Frank Efroim Spector, William Schneiderman, Al Richmond, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly, Philip Marshall Connelly and Frank Carlson, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeals from the United States District Court for the Southern District of California, Central Division

OPINION—March 17, 1955

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

Defendants in this criminal case were convicted by a jury upon an indictment which charged them as participants in a conspiracy to commit crimes with the specific intent of causing the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit. The trial lasted over a period of some six months, and the jury, before returning its verdicts, took six full days for deliberation. Each defendant has appealed from the judgment of conviction entered pursuant to the finding of the jury. Every phase of the indictment, the [fol. 769] trial, the instructions and the theory of the Court has been raised by motion, objection, exception and assignment of error.[1]

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[1] A motion for bill of particulars was made and denied, a motion to suppress evidence upon the ground that the methods whereby it was obtained were illegal, a motion to dismiss the indictment on the grounds it was barred by "res adjudicata," a motion to order government agents to desist from surveillance during the trial, a motion to in-

The impressive feature of this case is that practically every assignment of error urged in this appeal has been ruled upon by the Supreme Court of the United States in Dennis vs. United States, 341 U. S. 494.[2] There the basic statute in the original form was held "inherently" constitutional and also as applied to a situation involving a similar conspiracy connected with the unlawful concert found to exist in the case at bar. In the main and concurring opinions, principles were laid down which are virtually conclusive here. The defendants, notwithstanding this positive holding, paradoxically complain that the trial court here denied their motion to take testimony on written interrogatories with respect to the impact of the Smith Act and its enforcement on First Amendment rights, and rejected an offer of proof on the ground that the Dennis decision had foreclosed any further proof of unconstitutionality on the facts then before that court.

Defendants principally contend, as they must to prevail, that the trial court here departed in the course of the trial from the mandate so laid down by the Supreme Court. A careful analysis must be made of the opinions of the highest court, the statute as then written and the indictment in that case in order to appraise the claims of error in the instant appeal.

[fol. 770] The indictment in the Dennis case was drawn

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vestigate alleged hampering of one of defendants prior to trial were made and denied. There were motions to strike from evidence declarations of third parties on various grounds. There were several motions for mistrial, and finally there were motions for arrest of judgment. Other motions of various types were made and denied. The opinion deals specifically with certain of these motions. Generally, the discussion covers the points raised. It would extend the discussion intolerably to cover each in detail. The rulings were not erroneous.

[2] In the District Court, this case was entitled United States vs. Foster, 9 F.R.D. 367. The opinion of the Court of Appeals of the Second Circuit appears as United States vs. Dennis, 183 F. 2d 201. Throughout the opinion here, that case will be referred to as "Dennis" in whatever court the particular proceeding may have taken place.

in accordance with the basic statute, which appeared as Sections Ten and Eleven of Title 18, U.S.C. (1946 Ed.). Section Ten, as originally enacted and as it was in force at that time, read as follows:

> "(a) It shall be unlawful for any person——
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> "(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
> "(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
> "(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

Original Section Eleven read as follows:

> "It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

In the light of this statute, the Supreme Court wrote the principles which defendants say the trial court here refused to follow in several essentials. First, it is contended that basic liberties guaranteed by the First Amendment and other constitutional provision were submerged by an expanding wave of restraint brought about by an improper application of the Smith Act. Second, they say the highest court required a finding of a clear and present danger from the conspiracy, and none was made at this trial. Third, defendants claim the approval of the Supreme Court of [fol. 771] certain other striking phrases given currency in

the trial of the Dennis case constituted positive fiat that these be used in all future cases.

First, the Supreme Court ruled definitely that constitutionally guaranteed rights, including freedom of speech, of publication and of assembly, were not violated by indictment and conviction under the Smith Act in the form above quoted. The courts were dealing there with substantive law as set out in that statute, which related to organization for the purpose of teaching and advocating overthrow. Section Eleven of the Act as it then read, by use of the words "to conspire to commit," denounced as principals all who engaged in the attempt or in joint action to bring about the acts specified as criminal. Mere membership or officership in the Communist Party, insofar as that organization was shown by the evidence to teach the proscribed doctrine, might have been taken as proof against the individual defendant of joint action with others to bring about the end intended.

However, in face of the challenge of the dissents there, the Supreme Court held the nature of the joint activities of those involved was such as to bring about a "clear and present danger" and that, collectively, the conspirators had "power to bring about the evil." The latter phrase apparently meant that the setting in which the defendants there acted was such as to allow the court to conclude that the teachings might have resulted in an attempt at overthrow. It is true that, in accomplishing the result, the courts treated the Smith Act as though the substantive crime of conspiracy were charged. Moreover, the appellate courts approved the importation into the statute of a specific intent and object which was not expressly authorized by the wording of the particular section and which was not incorporated in the formal charge. As we shall see hereafter, the current indictment gave scope for these judicial additions.

Specifically in the second place, it is said the trial judge here violated principles there enunicated by failing to find a "clear and present danger" to the government by whatever the proof showed was said and done by defendants. In the Dennis case, with a factual situation typical of the case at bar, the highest court approved a statement as a mat- [fol. 772] ter of law by the trial judge that a clear and

present danger there existed in virtue of acts and intent of the defendants in that group. If that were a true rule of law for the Dennis case, it is the rule of law here. For world conditions at the date of that trial had not changed for the better when trial in the instant case was had. It must be remembered that the eleven convicted defendants in that case were named in this indictment as co-conspirators although not made defendants. Much of the literature and writings introduced were identical, as was the general type of proof, although we attempt no comparison of the respective records. While an independent conspiracy was charged here, the design was as closely connected as to the previous combination as a spoke to the wheel.[3] There

Finally, the opinion of the Court of Appeals and a concurring opinion in the Supreme Court gave approval of instructions of the trial judge in Dennis requiring the jury to find "language of incitement" was used by the conspirators there. Another phrase given approval is that the doctrine of destruction had become a "rule of action." In conjunction with an indictment based upon such a statute proscribing organization for the purpose of teaching and advocating overthrow, but which required neither proof of overt acts nor a specifically planned objective, such precautionary instructions were well enough. But these expressions of the judges in instructions in connection with the original statute established no unalterable requirement that such phrases themselves be used *ipsissimis verbis* where the changes in the basic law and an entirely different indictment predicated upon the conspiracy statute have rendered admonitions to a jury in such language supererogatory. Such claims have been answered in the main opinion in Dennis:

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review

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[3] See Kotteakos vs. United States, 328 U. S. 750.
organization was charged nationally, and here there was special emphasis on organization in California. The essential pattern was similar. Since this may not be the exact point of the contention, the matter will be considered in other connections later.

> here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more [fol. 773] certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. * * * To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

Defendants themselves say that there were significant legal and factual differences between the situation in the Dennis case and the case at bar. We agree. The situation has been changed by farreaching legislation and rulings in further and complete protection of the rights of these defendants. As a result, there are vital distinctions between this case and those which have been previously ruled upon.

The question is whether the trial court here followed the applicable concepts of Dennis in a changed situation. The attacks upon the manner in which the case at bar was tried and the incidents are now for consideration.

The indictment [4] charged the defendants themselves and certain persons convicted in the Dennis case with conspiring (18 U.S.C.A. Section 371) to commit offenses against the United States prohibited by the Smith Act as amended, 54 Stat. 670 (1940); 18 U.S.C. (1946 Ed.) Section 10, (1948 [fol. 774] Ed.) Section 2385,[5] "by (1) willfully and know-

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[4] The comparison of the indictments in the Dennis case and the case at bar is graphically set out in United States vs. Schneiderman, 102 F. Supp., at pages 97-102.

[5] The Smith Act, in the form in which it appeared upon the books at the time of the trial here and at present, reads as follows:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence,

ingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit and by (2) willfully and knowingly organizing and helping to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

The means were elaborated by charging, as a part of the conspiracy, the matters epitomized as follows: (2) "conspirators would become members, officers or functionaries in the Communist Party" "and in such capacities would assume leadership" "and responsibility for carrying out its policies and activities"; (3) would cause to be organized units of the party in New York and California and would recruit members; (4) would publicize and circulate publica-

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or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays, any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, konwing the purposes thereof——

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction." 18 U.S.C.A. § 2385.

tions advocating overthrow; (5) would write articles and directives for printing in publications of the Communist Party; (6) would conduct schools and classes in which recruits and members would be indoctrinated; (7) would agree upon and carry into effect plans for vital parts of the Communist Party to go underground and there continue the conspiracy; (8) would use false names and documents to conceal their identities and activities as members and [fol. 775] functionaries, and (9) would conceal the existence and operations of the conspiracy.

A series of overt acts were alleged to have been done by one or more defendants "in furtherance of the objective of the conspiracy."

The first of the differences btween this and the Dennis case is that the present indictment charges the inception of this crime as a continuing conspiracy on June 28, 1940, and in full effect until the date of finding of the indictment, which was December 21, 1951. This, of course, constitutes no ground for objection to the indictment. The mere fact that the indictment for the coordinate activities in the Dennis case was less broad in scope is of no avail to defendants here. Certain phases of the claim of variance will be dealt with later.

Second, it is contended that a change was caused by legislation for the protection of defendants. A new Act provided that officership or membership in the Communist Party should not constitute "per se" a violation of that Act, requiring registration by such members, "or of any other criminal statute."[6] Likewise, it was provided therein that registration by a Communist member or officer under that Act should not be used as evidence against him in any criminal proceeding. Apparently, this made a change in the law previously, as teachers and club chairmen were held to be in the position of co-conspirators in the Dennis case. 183 F. 2d 230, 231. At this point, concern is had only with the effect of the section just referred to upon the indictment. The divergence from the form of indictment used in the Dennis case required peculiar phrasing emphasizing the

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[6] September 23, 1950, ch. 1024, Title 1, Section 4, 64 Stat. 991, 50 U. S. C. A. Section 783(f).

individual nature of the charge. The instrument here highlights the fact that, among the means agreed upon, the individual defendants were to obtain membership and offices and assume leadership in order to bring about the objective charged. The Communist Party of the United States was not indicted. No defendant was indicted for organizing the Communist Party of the United States. None was charged with guilt because of membership or holding office in that party. But each was fairly charged with joining in concert [fol. 776] of action to organize a society "as the Communist Party" and to use leadership therein with the intent to accomplish overthrow.

The third change was farreaching. Since the Supreme Court had upheld a conviction for joint action under substantive provisions of the Smith Act as then written, it was a great protection that Congress, by the change in the wording of the law, left the way open to discard the vague "conspiracy" clause of the original statute, and to use instead the standardized body of law with which the profession was familiar by framing the indictment under the specific enactment proscribing conspiracy as a substantive offense.

This section, which was first placed upon the books in the year 1867, is now codified with some changes as 18 U. S. C. A. Section 371, which reads in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The literature of the law relating to the substantive crime of conspiracy is voluminous and covers every phase of indictment, trial and judgment.[7] The use of the statute in this case was of great advantage to defendants as well as the government, since the precedents made the issues crys-

[7] The notes of decisions under this statute cover over 315 pages of United States Code Annotated.

tal clear [8] and enabled the trial judge to rule with justice. Specifically, this charge of the substantive crime of conspiracy placed the government under heavy burden as to proof, which will be explained hereafter. In the Dennis case, the courts treated the original Smith Act quoted above as containing a charge of conspiracy and applied the law without any of the limitations set up by the precedents which have been developed under Section 371. It cannot therefore be charged by any except a lawyer impelled by zeal for a client that the instant case is one "where prosecu- [fol. 777] tion for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." But the objection is, of course, urged here by lawyers for the defendants. The concurring opinion of Mr. Justice Jackson in the Dennis case, which treated the indictment there as if it contained a charge of conspiracy as a substantive crime, was, of course, unsound as related to that case. The doctrine was treated as applicable in that opinion although the limitations contained in the statute are not mentioned. Although it is clear that, in the opinion of the other justices, a true conspiracy charge was not involved, the convictions were upheld in the face of the exposition of the place in our political structure which is maintained by personalized individual freedom of speech, publication and assembly.

An indictment which, as the one at bar, charges an agreement by two or more persons willfully and knowingly to organize a group, society or assembly of persons and thereby develop and use an apparatus designed and dedicated to advocate and teach overthrow and destruction of the government by force and violence when each person entering the concert of action is charged with entertaining the specific objective and intent of causing such overthrow pleads a "standard" conspiracy.

Where an unlawful agreement is set up, even though the means intended to be used were entirely legal, if the ultimate objective be criminal, a conspiracy is alleged. Under this indictment, if it be assumed that advocacy and teaching are

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[8] Cf. Pinkerton vs. United States, 328 U. S. 640.

immunized by the constitutional guaranties, still, even though these means were lawful and protected, since the advocacy was intended to cause the destruction and overthrow of the government by force, a criminal conspiracy was defined.

An overwhelming advantage to each defendant by indictment under 18 U. S. C. A. Section 271, was the provision thereof which required an "overt act" to be proved as well as a "conspiracy" before conviction could be had under this phase of the Smith Act itself. This was a farreaching change from the situation in the Dennis case for persons accused. By the statement of things actually done by a particular person or persons, the matter was not left to conjecture as to the nebulous design based upon utterances [fol. 778] and publications alone, but specific occurrences were to be set up whereby the supposed conspirators in unlawful agreement effected a debouchment into the field of positive action. Defendants make an elaborate theoretical argument that the "act of conspiring" or "compassing by bare words or saying" or "the imagination of the mind to do wrong" is not sufficient "without an overt act." However effective this thesis might have been in the Dennis case, it is frustrated and rendered nought by the form of the indictment. Congress had already answered the theoretical thesis by the amendment above noted, which emphasizes the deep gulf between the situation here and that in the Dennis case. But the pleader here included the overt acts charged as carrying out the "standard" conspiracy of Section 371. Twenty-one allegations of overt acts were made, which is sufficient. The suggestion that the acts alleged were in themselves innocuous is not valid. The law relating to this crime does not require more than the allegation contained in the indictment that these were done in pursuance of the unlawful agreement and to effect the purpose thereof.

The principles of freedom applied to speech, publication and assembly must be preserved. Under the instant indictment, there are implications which must be considered, but the impact is much less direct than in the Dennis case. As heretofore indicated, the charge here is of a substantive conspiracy to act with a definite objective where one overt

act must be alleged. The teaching and advocacy of the duty and necessity of destruction of the government by force and violence, although criminal by substantive enactment, are here by the langauge of the charge made subservient to the alleged purpose and object of organizing to advocate and teach with intent to destroy and overthrow as speedily as circumstances permit. The indictment in the Dennis case was entirely different.

Finally, a vital metamorphosis was brought about by attacks of defendants themselves upon the two original indictments. The trial judge held that such indictments did not sufficiently state the ultimate object of the conspiracy and the individual intent of each conspirator to bring the postulated action to fruition. In redrafting, the pleader amalgamated the two indictments and added the words which had been approved by the Supreme Court as suffi- [fol. 779] cient to set forth a criminal state of mind in Dennis. The defendants were advised beforehand that the government was to establish as a prerequisite of conviction that each one had as an object "the overthrow and destruction of the Government of the United States by force and violence as speedily as the circumstances would permit." As noted above, it is hornbook law that a conspiracy is an agreement by two or more persons to accomplish a lawful objective by unlawful means or, on the other hand, by lawful means an illegal objective.[9] By making this one of the essentials of proof beyond a reasonable doubt by the government as to each individual before he could be designated

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[9] The trial court consistently and definitely ruled throughout the trial and the instructions that this was a conspiracy to violate the Smith Act. Although purists might find a difference between conspiring to teach, advocate and organize with intent to bring about speedy overthrow and destruction by force and violence and conspiring "to overthrow, put down, or destroy by force the Government of the United States," proscribed by 18 U. S. C. A. § 2384, the latter statute which was mentioned in the Dennis case (pp. 581-2) might well be applicable to the indictment here. No problem arises in that connection since the trial court clung to the theory that the Smith Act alone was applicable.

as a co-conspirator, by the process of stating in the indictment the objects of the alleged "standard" conspiracy, a chemical change was wrought therein.

Defendants made a motion to dismiss the present indictment. It is implicit in the contention thereon that they assert the phrases heretofore referred to must have been included and that it must be charged formally that the activities of defendants created a "clear and present danger," that each defendant had "power to bring about the evil," that defendants conspired and agreed to use the "language of incitement" in teaching and advocacy, and that defendants conspired and agreed to make the duty and necessity of overthrow a "rule of action." Defendants were hampered in making such arguments explicit because neither the indictment in the Dennis case nor that in the Flynn contained any such allegations.

The trial court correctly held that the indictment charging a standard conspiracy to commit offenses against the United States in violation of the amended Smith Act, by teaching, [fol. 780] advocating and organizing, alleging specific overt acts and defining precisely a proscribed intent, was sufficient.

Finally, in its present form, the indictment by its inherent terms charged not only that the language of incitement was used, but it was used in order that the proscribed doctrine should become a rule of action. It is the very gist and gravamen of the present charge that action was agreed upon in organizing local groups and societies in California and in infiltrating labor unions and other organizations. It was alleged that overt acts were committed. In ordinary crimes, this is sufficient. If conspirators to commit a crime of violence are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained.

This leads to another contention of defendants, which is laid at rest by the language of the charging instrument. It is contended that the trial court incorrectly defined the word "organize" used therein. But the indictment itself charges that the conspiracy was to organize a society, group and assembly of persons who advocate and teach the duty and necessity of overthrow "as the Communist Party." It is

alleged that the conspiracy continued until the date of the finding of the indictment. But the basic charge was expanded by the specific clause. "Organize" is defined by exact phraseology in Section (3) of the indictment as follows:

> "It was further part of said conspiracy that said defendants and co-conspirators would cause to be organized Groups, Clubs, Sections, District and State Units of said Party in the State of California and elsewhere and would recruit and encourage recruitment of members of said Party concentrating on recruiting persons employed in key bases, industries and plants."

Even if the Communist Party of the United States were given a constitution and by-laws in 1945, as defendants contend, by the help of the co-conspirators and had certain officers, this does not mark the date when this combination completed organization of a group, society or assembly of people who advocate and teach destruction *"as the Communist Party of the United States."*
[fol. 781] The dictionary definition of organization indicates that "to organize an army" is a phrase which clarifies the meaning of the verb. If one started out to organize the 25th Army with nothing more than the order creating the entity, organization would not be complete simply because the headquarters had been put together and the general officers and staff officers selected. The bare cadres of the regiment would not be sufficient. Recruitment, formation of units, completing officer personnel, regrouping of personnel in different units and expansion of various units to the prescribed or desired strength would be necessary. We may well agree that, once the 25th Army has been completely created to authorized strength and officered, thereafter recruiting for replacement or change of one regiment for another would not fall within the designation. The charge that there was a conspiracy to organize the 25th Revolutionary Army, there being no such organization at the time, might, of course, show that the concert of action for that purpose lasted for years.

This consideration brings up logically the next contention of the defendants that the Statute of Limitations barred

prosecution in this case. The indictment itself destroys this argument. As noted before, it charges a continuing conspiracy from June 28, 1940, to the date of finding the indictment. The contention is that the Communist Party of the United States was completely organized in 1945, and that therefore the statute ran against this portion of the charge. It has already been noted there is no charge of conspiracy to organize the Communist Party of the United States as such. The activities of organization are particularly defined in the indictment. There is no doubt that certain of these activities occurred within three years of the filing of the formal charge.

The accusation is of a continuing conspiracy. Even if the above considerations were unsound, still the indictment would be valid and timely because it is alleged that the conspiracy continued until the date of the finding in the indictment. If, in a conspiracy of a nonpolitical nature, it were alleged that the defendant combined and agreed to commit two offenses or crimes with the design to bring about an ultimate objective as soon as circumstances would permit and committed overt acts pursuant to the conspiracy within the three year period, the indictment would be suf- [fol. 782] ficient. Even if it were established by judicial knowledge or otherwise that one of the substantive crimes charged as the objective of the continuing conspiracy had been fully consummate and complete, so that the statute of limitations had run against prosecution of the substantive offense, still an indictment would lie for a conspiracy, the grand objective of which had not yet been attained. Here, where the charge is that each defendant acted with intent to bring about the overthrow and destruction of the Government of the United States, it cannot be assumed from reading the indictment that the defendants abandoned the conspiracy until the event which they intended had been consummated. Only one conspiracy is charged, to commit several offenses against the United States. Therefore, the mere fact, assuming it to have been proved, that the crime of organizing had been complete, the conspiracy would still have continued in order to teach and to advocate destruction.

In this place, because it is a logical development, the question of the scope of the conspiracy in time and the sup-

posed variance will be considered, although phases of proof and instructions enter therein. One of the most distorted concepts of the defendants is that, if an agent or attorney employed by the United States has taken a position in some criminal prosecution that the Communist Party was completely organized in 1945 or that a court has accepted such a position for the purposes of the case before them, the United States is thereby estopped in this case from taking any contrary position. This concept is not founded upon any familiar doctrine of double jeopardy, res adjudicata or estoppel by judgment. Defendants make the claim for all parties and each defendant, whether or not he may have had connection with the previous litigation.

These contentions will be squarely met. None of these claims is valid. These defendants, who were not parties to the Dennis case or the Flynn case [10] can hardly have been [fol. 783] prejudicial if the United States Attorney in Los Angeles charged a conspiracy separate from the ones in those cases, as initiated in 1940 and continuing until 1950. The principles laid down by the Supreme Court in the Dennis case are applicable, but no one has contended that the facts of the two cases were exactly the same. The mere fact that there was a connection between the defendants and the parties charged in the Dennis case and that the overall criminal design was the same is of no relevance. The government was not estopped from alleging and proving that these defendants conspired to help organize a society, group or assembly "as" a part of the Communist Party in the State of California.

The fact that another contention was made in another

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[10] In United States vs. Flynn (S.D. N.Y., unreported), the instruction was that the statute of limitations had run against the conspiracy so far as organizing was concerned. This may have been well enough as a precaution. Actually, it was prejudicial to defendants since the government was thereby relieved of the necessity of proving that the defendants combined to organize. The instruction on this feature was: "To find a defendant guilty, therefore, you must find that he conspired to teach, but it is not necessary that you find as well that he conspired to organize the Communist Party."

record or was stated by some court in dealing with other contentions is not binding here. The fact, if it be a fact, that there were constitution and by-laws adopted in 1945 would not mean that the party was organized except in the loose sense. But the organization of a group, society and assembly would not be completed by that formal constitution. There would still have to be members, and it was specifically charged that, to complete the membership in California, it was the design to add new groups and recruit new members. Of this defendants were on notice. They could not be heard to complain that in some other case the agents of the government proved something different. The defense offered no proof of a contrary state of facts than that shown here. Furthermore, there was not introduced in evidence any record in which the facts here claimed to have been adjudicated were established.

By the same process, the remainder of the defendants attempt to take advantage of the favorable opinion of the Supreme Court of the United States in the case entitled William Schneiderman vs. United States, 320 U. S. 118. Here again, no record was proven. The defendants here were not parties to the prior civil case. They could take no advantage of it, whatever the holding.

Furthermore, even as to Schneiderman himself, the denaturalization case was not res adjudicata. The record was [fol. 784] not introduced [11] as to him either. The true state of the matter was that the trial court there made findings of fact that Schneiderman was not attached to the principles of the Constitution of the United States because he was an officer in the Communist Party at the date of his admission, and cancelled his citizenship. The Supreme Court of the United States had no power to make findings on appeal, but dismissed the case, apparently on the ground that Schneiderman was not shown personally to have interpreted the Communist literature as advocating overthrow and that therefore the findings were clearly erroneous. Other opin-

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[11] The majority opinion of the Supreme Court without the dissent was introduced, which was highly favorable, but this did not supply the essential foundation required to establish such an affirmative defense.

ions there seemed to go on the ground that, at the naturalization hearing, the court had found that Schneiderman was attached to the principles of the Constitution. In any event, whatever the holding, it can do Schneiderman no good here. No precedent has been cited nor are there any which establish the doctrine that a prior judgment in a cancellation of citizenship case estops the government or that the findings therein are res adjudicata against the government in a subsequent criminal case. The analogies are all to the contrary. It is a bright idea, but no one seems to have thought of it before.

Attention is now directed to the claimed error in the admission of specific evidence. Apparently there is urged that no proof was admissible as to any overt act, because it is said none of those alleged could have been such as "clearly and unequivocally to effect the specific object of the conspiracy." The specific object, according to the indictment, was the teaching and the advocacy and organization for destruction and overthrow. Even belief may be removed from the circle of immunization, although this cannot be done "in the absence of overt act indicating such was his interpretation."

To take one example, the indictment charged, as mentioned above, one such act in the following language:

> "On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting."

The proof showed that the meeting was called for several purposes, as outlined below. Steinberg made a number of [fol. 785] speeches there, and stated that "this was a Lenin Memorial meeting," at which he presided. An announcement of the meeting in the People's World asked persons to attend and "demonstrate for the Bill of Rights" as it would "serve primarily as a protest against the current trial in New York of twelve national leaders of the party." There was no question about the facts, which were uncontroverted, if the jury believed the testimony.

In the face of the objections that this was the act of a member and officer of the Communist Party and that it had no reasonable tendency to effect the proscribed objec-

tive, the evidence was clearly admissible to show the acts and intent of Steinberg personally or his participation. Without doubt, aside from this, the evidence was admissible on the allegation of the overt act. It was for the jury to determine, under proper instruction, whether the act was done with the intent and whether it tended to effect the object. Other allegations of overt acts made admissible proof thereof. No detailed discussion will be accorded them therefore. In each instance, the evidence admitted could have been justified upon the ground that it was in any event relevant as to the intent or participation of a particular defendant.

The defendants object strenuously to the receiving in evidence of various classes of reported words of the defendants and other persons. This question has been raised in each of the cases which have arisen under the terms of this Act, and it has been uniformly held that the usual rules of the criminal law in relation to conspiracy prevail. The chief complaint as to the utterances of the defendants themselves is that they are not sufficient to establish conspiracy or intent. But the expressions of a defendant in a criminal case are admissible against him either as admissions against interest or as voluntary acts which it is testified he has done. These utterances of a particular defendant were not protected from admission into evidence by the guaranties of freedom of speech. They could be related to a jury for the purpose of allowing the jury to determine whether the party were acting with an innocent or guilty intent as required. In criminal cases, the utterances of a defendant reported in court by other witnesses have always been received to determine intent. The declarations and acts of each defendant on his own account are particularly important since [fol. 786] his individual participation and intent must be shown independently of and without relation to declarations or acts of others.

Before the acts and declarations of third persons become binding upon an individual under the law of conspiracy, there must be shown to be (1) an illegal agreement to commit crime by two or more persons, (2) that the particular defendant was a knowing and willful participant, and (3) that the act or declaration by third party conspirator was in pursuance to and in order to bring about the criminal

objective. Proof of close association and concert of action over a period of years among those charged as co-conspirators might have established prima facie the unlawful agreement. If the other conditions were met, declarations and acts of third parties would be admissible against a particular defendant. In this connection, the proof of the association was not inadmissible by the particular defendant's membership or holding office in the Communist Party, for the indictment charges that the organization of a society or group was one of the objects, and even defendants do not claim organization of the party until 1945. But it is claimed that the third party declarant cannot be shown to be a co-conspirator by his own admission of membership in the party. This is correct. But proof of association in teh activities, coupled with such a declaration, might be sufficient. No instance was pointed out where such connection was not shown.

A great deal of evidence to prove "the nature and character and aims and objectives of the Communist Party" were objected to, and admission is assigned as error. It is, of course, agreed that the party was not indicted. But defendants were charged with conspiracy to organize a society or group to advocate and teach. Everything which was advocated and taught at meetings of the group or society would be relevant to determine what the purpose of the organization was. If it was found that the society or group was in the process of organization as the Communist Party, the teaching and advocacy under its auspices would be pertinent, whether or not defendants were present. It is true, an expression or utterance at such meeting would not be binding upon the Communist Party and, unless made by a co-conspirator, would not be binding upon a particular defendant, but it would be admissible. However, what was taught and advocated at schools and meetings of the Communist Party after the date of the formation of the con- [fol. 787] spiracy would be admissible in order to prove how much, if any, success the conspirators had in carrying out their illegal plan to organize groups, societies or assemblies and obtain recruits and to teach and advocate destruction. This became particularly pertinent in determining whether the conspiracy was still continuing during the three-year period prior to indictment and in determining

with what intent any defendant did one of the alleged overt acts within that period.

There was no statute such as the Smith Act before the passage of that enactment in its original form on June 28, 1940. It is contended that no evidence of the aims and objectives of the Communist Party then in existence (and which defendants claimed was later dissolved) by expressions at its meetings or the teaching in its schools was entitled to admission. But it must be remembered that some defendants were shown to have been closely associated with that organization and with each other, and they claim that its teachings were innocuous. The government was not selective, but introduced the literature and the expressions. These were pertinent if only to show there were other possible interpretations of the doctrine besides the version to which defendant Yates testified. Defendants had full opportunity to rebut these interpretations. It cannot be said these were inadmissible. The trial court might possibly have excluded such testimony on the ground of considerations of remoteness or administrative convenience. It was unquestionably relevant and therefore it was not error or abuse of discretion to admit the evidence.

After the introduction of the evidence by the government, which ran over nine thousand pages besides the voluminous exhibits, all defendants rested except Schneiderman, Yates, Stack and Carlson. The evidence of the defense consisted of two witnesses who testified shortly, the reading of a deposition and the testimony of defendant Yates. The latter consisted almost exclusively in an exposition of her "understanding" of the Communist Party teaching and advocacy on achieving the socialist revolution. Although the evidence intrinsically must be sufficient to convict beyond a reasonable doubt as to each defendant, it must be borne in mind that the jury weighed evidence which was in essentials uncontradicted.

[fol. 788] Many of the arguments, and indeed most of them, are reiterated in relation to the instructions given and refused. The trial court gave instructions on the subject of conspiracy to commit offenses against the United States, which are couched in precise and accurate language and which correctly reflect concepts approved by the Supreme Court and other federal courts over the period

of approximately eighty years during which this law has been upon the statute books. Appropriate cautions were given to protect fully the rights of defendants.

It was said that the conspiracy must be found to have existed as charged before the allegations of overt acts could be considered. The defendants contend that the overt acts charged in the indictment consisted of the exercise of either freedom of utterance, freedom of publication, or the free use of the right peaceably to assemble, and that therefore such acts, having been immunized by the Constitution, could not be used as indicia of crime. But it is well settled in ordinary conspiracy cases that the overt act proven need not have inherent criminal attributes or connotations, if it carries the illegal design into the filed of action. For, if criminal purposes can be shielded from prosecution by the use of speech, there will be no more convictions of those clever enough to use this medium.

It is true such an act in itself could be innocent. In order to consummate the conspiracy, as the court said, "It must, however, be an act which follows and tends to accomplish the plan or agreement, and must be knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment."

The trial court carefully limited the effect of testimony as to membership and officership in the Communist Party. Cautions against use of "similarity of conduct" or "association" or discussion of common "aims and interests" as absolute tests were given. The court instructed:

> "It has been said that 'a conspiracy is a partnership in criminal purposes'. The gist of the offense is a combination or agreement to violate the law,"

and that, if all elements of conspiracy were established,

> "then the success or failure of the conspiracy to accomplish the common purpose or design is immaterial."

[fol. 789] The requested instructions of the defendants, which the court refused, constitute a series of strange and distorted propositions as to the law of conspiracy. Defend-

ants contend that it was error to refuse a requested instruction that "the burden of proof cannot be met by showing that a particular interpretation of Marxist-Leninist theory is the most correct or the most probable interpretation with an inference therefrom that the Communist Party accept such interpretation" embodies all these errors. The conspirators were not indicted for teaching Marxist-Leninist philosophy or that of Stalin or Malenkov, but for conspiracy sparked by an intent to destroy.

The indictment did not charge that this literature on its face bore a sinister meaning, nor even that the individual defendants gave it a sinister meaning. Interpretations of the teachings of the Communist Party have no relevance because that entity was not on trial, nor were the doctrines which may have been taught or advocated by it. Defendants individually must have been found to have had the intent of immediate destruction. Each must have been found to have become a member of a combination so to teach and advocate and to organize persons who so teach and advocate with this object in view. Thus the interpretation of the literature, the written objectives and the constitution of the Communist Party of the United States, and the writings and speeches of the members and officials were irrelevant except as these tended to prove or disprove the individual guilt of the particular defendant of the crime charged in the indictment. Some instructions requested would give complete immunization to any speech, no matter if specifically uttered with the intent charged in this indictment. Any such formalistic test as this would, of course, give free rein to any subversive group because all they would have to do is to assemble to speak and to print words and distribute them. If then there could be argued that the meaning might be innocent on its face, the jury could not convict, according to appellants, even if it were one of the methods used to bring a conspiracy into the field of action.

Defendants apparently now contend the trial court should have told the jury that he found as a matter of law that the facts proved indicated "a clear and present danger." At least, they give lip-service to that contention. In our opin- [fol. 790] ion, such an instruction could be justified only as a comment on the evidence. The instructions of the trial

court clearly show that, if the jury convicted under the rules of law there laid down, they would have necessarily found a clear and present danger existed. If the trial judge had offered to instruct the jury as a matter of law on this subject, it seems that an exception [12] might have been taken on the ground of over-emphasis. The state of the evidence might justify it as it did in the Dennis case. Defendants can not rely upon the failure to make the comment by the trial court (a) because the exercise, whether justified or not, would be highly unfavorable to them, (b) because no litigant is entitled to a comment of fact by the judge, and (c) because the normal place for the trial judge to rule upon the question of law as to sufficiency of the evidence, including presence of clear and present danger would be upon a motion for acquittal.

Closely connected with this is the objection that the District Court made no ruling upon the power of each of the defendants "to bring about the evil." But the Supreme Court did not require any such proof as to each defendant in the Dennis case. It is obvious enough that, if it had, there could have been no conviction. To require the court to instruct that the co-conspirafors as a whole or that each defendant had the power to bring about the destruction of the government would be fantastic. If true, the revolution would have been consummated before trial. To require such a finding by a jury would be to ask them to take counsel of fear. In reliance upon the national aims and aspirations and the just consent of the governed, there are no such fears. On the other hand, if the trial court had thought these actions and utterances were merely vaporings of ineffective folk, upon motions for acquittal, a verdict of acquittal could have been directed.

Again, defendants make a point about the "language of incitement." They said the co-conspirators must have agreed not only to teach and advocate the violent overthrow as a duty and necessity with intent to bring it about as speedily as circumstances would permit, but that the trial

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[12] As the record shows, objection was made to Government's proposed instruction No. 23, which embodied a charge like that given in Dennis (R. 12346-7).

judge must have told the jury that, if it were found that [fol. 791] they had agreed not to use the language of incitement in teaching and advocacy thereof, no crime would have been committed.

The gist of the substantive crime of conspiracy is that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute. The use of such phrases in instructions might have been well enough where a violation of the Smith Act alone was charged in its original form. It would be folly to command imperatively that these specific phrases be each used in instructions after a trial on an indictment such as the present one.

In ruling upon the motions for acquittal, the trial court [13] decided as a matter of law that there was sufficient evidence to prove guilt of each defendant. In this ruling the trial court placed itself firmly as to each defendant upon the indictment which charged a conspiracy. The Supreme Court, in its main opinion in the Dennis case, said, "The formation by petitioners of such a highly organized conspiracy • • • subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions • • • convince us that their convictions were justified." There was sufficient evidence to show that such a conspiracy existed, particularized as to the California area, and that it was implemented by continuous organization and use of groups and societies for teaching and advocating with the proscribed

[13] The attitude of the trial judge to the questions argued here, and many others, is set out in a series of opinions: United States v. Schneiderman, 102 F. Supp. 87 (dismissing the two original indictments); 104 F. Supp. 405 (in camera inspection of documents); 106 F. Supp. 737 (disclosure of notes of witness); 106 F. Supp. 892 (striking of evidence); 106 F. Supp. 906 (motions for judgment of acquittal, new trial and arrest of judgment), 106 F. Supp. 927-941 (instructions to the jury).

intent, the determination of the trial court must be upheld. The arguments urging upon us that the trial court held that "advocacy plus intent" was sufficient to found a conviction has no basis. The trial judge did not rule that clear and [fol. 792] present danger could be found to exist simply upon the basis of the possession of the proscribed intent. The trial judge "equated" "incitement" neither with "clear and present danger" nor "incitement" with the intent to bring about speedy overthrow. On the other hand, by applying the specific law of conspiracy, we are not convinced that the trial court found governmental powers by implication to be without inherent limits or exploited this law to engulf all powers which might possibly be exercised by an absolute sovereignty in the face of express prohibition. Indeed, the arguments presented by defendants and amicus curiae are paradoxical. Some of these declare with great insistence that there should not be one law for trial of Communists and another law for trial of persons charged with crime generally: a doctrine which requires no exposition in this Court. It is with utter inconsistency that they urge measures fantastic and bizarre which have never been applied in ordinary criminal cases. The most striking incongruities are found in these presentations. No further notice in detail will be taken thereof, but a short review of some of the matters considered by the trial court will prove the soundness of his rulings with regard to the evidence.

The most significant questions which are present in this record are those which relate to sufficiency of the evidence. The review by the Supreme Court of the Dennis case did not explicitly relate to the sufficiency of the evidence there. But the opinion of the Court of Appeals leaves no doubt that there was a sufficiency of evidence in that case. There is no attempt here to compare the content of the record in this case with that in the Dennis case or the Flynn case or any other case prosecuted under this statute.

There are only two questions in this regard for this Court. First, whether on each specific point essential for conviction there is sufficient evidence so that it can be said a jury could find the issue was established beyond a reasonable doubt and to a moral certainty. The jury, by the verdict, have already

expressed their satisfaction with the proof. Second, whether, on the record as a whole, it affirmatively appears that the trial was fair and impartial and the verdict can be sustained.

Many of defendants sought and obtained office as "organizers" in the party. The jury might well have inferred [fol. 793] from this participation a carrying into the field of action a phase of an illegal agreement to organize a group, society or assembly and thereby to furnish the society with organs and to arrange and constitute into interdependent parts the Communist Party in California and to furnish recruits therefor. It must always be remembered that the jury were regularly instructed that membership or holding office in the party are not denounced as such. But this would not prevent them from concluding that acceptance of an office designated as "organizer" with duties to assist in organization, evinced a participation in the unlawful agreement and, together with other circumstances as to a particular defendant, might prove it beyond a reasonable doubt.

The association of most of defendants among themselves and with other co-conspirators and with other persons whose advocacy of destruction is known was clearly proved. Their acts and conduct in close control of schools and classes where party members and putative recruits were taught the tenets of violent overthrow were clearly established. Indoctrination in techniques of action to induce revolution and of assaults upon citadels of bourgeois power was furthered and encouraged by these instruments. As to many of them, an individual finding that he was a well-trained professional revolutionist might well have been made. The concert of action of all could have been found by a jury beyond a reasonable doubt. The proscribed intent could also have been found as to any defendant. The jury were entitled to infer from the associations and the activities of the individual defendants participation in the unlawful agreement charged in violation of the specific statute. As to each defendant,[14] the jury might well have found a sufficiency of

[14] Each of the separate defendants has filed a brief contending the evidence was insufficient to sustain a conviction as to him. Th. e have been carefully considered in a review

evidence of association and concerted action to convince them of guilt to a moral certainty by evidence which was inconsistent with every other reasonable hypothesis.

Therefore, it is the function of this Court to review the evidence in this case to determine whether the rulings of the trial court on the motions for directed verdict were correct. [fol. 794] We hold there was evidence from which the jury might have concluded beyond a reasonable doubt:

(a) That two or more persons named as conspirators, after June 28, 1940, had entered into a combination and conspiracy as charged in the indictment;

(b) That each defendant herein, knowing of the unlawful design, became a party thereto and entered into the combination and acted in concert with the others charged as conspirators;

(c) That after the formation of this conspiracy at least one overt act charged in the indictment to effect the object of the conspiracy and in furtherance of the objects thereof was performed by a defendant within three years prior to the filing of the indictment;

(d) That each defendant, in joining this concert of action and in any act done in furtherance thereof, had the specific intent to overthrow and destroy the government of the United States by force and violence as speedily as circumstances would permit.

Technically then, we find the trial impeccable from the standpoint of fairness and from the standpoint of adherence to principles theretofore laid down. It remains to consider some extraneous incidents. Appellants moved to postpone the trial because of the publication of a serialized article in a local paper with the usual lurid announcements that revelations would be made as to "how the Communists intend to overthrow the U. S. Government and when" with a great deal more of similar import. The fact that the writer had been a witness in the trial of the New York defendants named here as co-conspirators was dwelt upon. The series

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of the record. The evidence was sufficient to submit to the jury as to each. Certainly, therefore, as to each the evidence was sufficient to sustain a verdict of guilty. It is unnecessary to set out tabulations of the facts here.

opened January 20 and ended February 7, 1952. The trial opened and the jury was drawn on February 1. The defendants had opportunity for examination of members of the jury as to prejudice, bias and formation and expression of opinion. This is sufficient safeguard. No trial could even be held during time of war, such as this was, if public discussion of vital national issues was the basis for postponement. The defendants had ample protection against an inclusion of a juror affected by such a newspaper discussion by the voir dire and the use of peremptory challenge. [fol. 795]. If the trial could have been postponed for sixty days for that reason, the defendants could never have been tried until Communism would have become a dead issue, no longer the subject of newspaper discussion. There was here no abuse of discretion.

There was a motion for mistrial based upon the affidavit of one of defendants, in which the following facts were set up: on June 25, 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, at the request of Senator McCarran, Chairman of the Senate Internal Security Subcommittee, forwarded to the latter a monograph prepared by this organization. This document dealt with the advocacy of the Communist Party of violent overthrow of the government, and contained considerable documentation from the so-called Marxist-Leninist classics. The monograph was released to the press in Washington by Senator McCarran on July 29, 1952. That day and thereafter, just as counsel for the defense had completed his first argument, the release commenced to receive widespread coverage in Los Angeles by all leading newspapers, radio and television, and through such media excerpts from the monograph were broadcast to the public. When the matter was called to the attention of the trial court by motion for mistrial, various suggestions were made as to how the matter might be handled to discover whether the jurors had disobeyed the continuous instructions of the court to confine their attention to the evidence. The defendants were clearly fencing. The trial court decided to trust the jury. This reliance upon members of that body to act as judges is in accordance with our finest traditions.

The trial court said: "It is regrettable that the report was released for publication at an unfortunate time from

the standpoint of all concerned with this trial." Unquestionably, the matter was of immense public interest and was within the public domain. The media of publication had a right to publish. It has been pointed out that the government of a republic cannot operate without the pitiless light of publicity. Great service is performed daily by exposure of matters which, if suppressed, would operate to destroy our security. When the country was at war, as it was on July 1, 1952, publicity was especially necessary over matters of national concern in moral and ideological defense of current aims. Still, it should never be forgotten that if there [fol. 796] is a failure to accord to defendants a fair and impartial trial in a criminal case, the foundations are weakened. The powers of the trial court are conferred upon it for that express purpose. The media of publicity have an even greater responsibility than the courts to see that there is a fair trial of politically unpopular defendants. Somehow, there is a current belief that publicity is uncontrolled and that the courts are powerless to protect those charged with crime.

Ever since this Court has had this matter, there have been positive directions through publicity as to how it should be decided. But judges are products of a hardy climate. We do not palliate the offense, however. Such expressions do positive harm. It tends to make the public believe the courts accept such directions if the prophecy happens to be correct. It is much more true when a verdict of guilty is brought in after a great fanfare of publicity. With the trial court, we believe, to say the least, the incidents were extremely regrettable in the public interest.

However, a jury which had heard the evidence contained in this record over a period of six months, who deliberated for six days after the arguments, who had heard constantly reiterated warning not to read anything, not to listen to the radio and not to discuss anything which related to the case, probably tried to carry out their instructions and decide the case on the evidence. The trial judge believed this jury could be trusted. We do not think, simply because they arrived at a verdict of guilty, that his judgment was unsound.

Besides, there is a striking anomaly in the position of defendants. They claim the right to teach, advocate and as-

semble in the cause of sedition without interference so long as they take no action. They claim the right to advocate the duty and necessity of the overthrow so long as they do so sotto voce. They claim the right to hold publicity meetings in honor of the political saint of a sinister foreign power and demand the acquittal of their fellow conspirators then on trial. Yet they protest the right of a United States senator to give out a release on a subject vital to the security of this country in time of war. Apparently the Bill of Rights is double-edged.

[fol. 797] Even if the jurors or some of them heard or read some part of this public discussion—a fact not proved—this Court is of the opinion the verdict was founded on the evidence. The trial court properly refused to invade the secrecy of the petit jury room in order to discover material to cavil at the determination.

In conclusion, in the Dennis case the court was dealing with the substantive crime denounced by the single statute.

> "The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of Section 2(a)(1) and 2(a)(3) of the Smith Act, involved in the conspiracy charge."

This statute has now been amended and the present indictment is much broader and bottomed essentially on a different enactment. There, in construing the specific act, the main opinion suggests:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction."

While the Supreme Court professedly did not review the evidence of the trial, there is indication that, if it had not been deemed sufficient, the conviction of the co-conspirators would have been set aside. The main opinion states:

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to

bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute."

It may be that prospects of larger policy or changes in the look of international affairs should be viewed to fix the acts proven here in perspective. But, as we understand it, as a lower federal court that is not our function. At the [fol. 798] time this case was tried, there was a background of war. The law which was passed in 1940 was passed to meet emergencies created by war although not especially to meet the threat involved in this case. That enactment has been denounced as the first peacetime sedition law since 1798, although anyone who believes the country was not at war in 1940 does not squarely face the facts of life.[15] If the founders were advised that statute was necessary to meet the threat of the excesses of the French Jacobins then tending toward world-wide imperialism with a fatalistic zeal and a crusading flair and therefore compatible with the new Constitution, the Act of 1940 was probably advisedly deemed necessary by the Congress to provide for the national defense and protect the national ideals and aspirations.

On the other hand, the future of this country is imbedded in the fundamental guaranties. The right to speak freely, even though tremendous majorities disagree, is fundamental. The power to assemble peaceably to present grievances is a foundation of liberty. The right to publish expressions and give them distribution dispite official disapproval must be retained. The jury found defendants guilty beyond a reasonable doubt of conspiracy to commit offenses against

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[15] See opinion of December 23, 1940, Stone vs. Christenson, 36 F. Supp. 739: "The petition of Stone rings changes upon 'peacetime' conscription. * * * but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, a failure to register manpower of the country would be a failure to provide for 'the common defense'."

the United States of America "with the intent of causing the aforesaid overthrow and destruction of the government by force and violence as speedily as circumstances would permit." The actions, teaching, publication and freedom of assembly allowed without implication of criminality seem sufficiently to have vindicated the fundamental guaranties. The trial court elaborated upon the rights of defendants as follows:

> "Under our system of law, guilt of crime is a personal and individual matter. You may not convict any defendant merely by reason of the fact that you may find him or her to have been an officer or member of the Communist Party of the United States, no matter what you may find were the principles and doctrines advo- [fol. 799] cated and taught by that party during the period covered by the indictment. * * * The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy. * * * Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants. * * * The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence. * * * The government referred to is the present Government of the United States, which does afford to the people democratic means for bringing about such changes as they desire; not some hypothetical future government which affords no such means. * * * The defendants, in common with all other persons living under

our Constitution, have a general right protected by the First Amendment to hold, express, teach and advocate opinions, even though their opinions are rejected by the overwhelming majority of the American people; and have the further right to organize or combine peaceably with other persons for the purpose of spreading and promoting their opinions more effectively. * * * Whether you agree with these opinions or whether they seem to you reasonable, unreasonable, absurd, distasteful or hateful has no bearing whatever on the right of other persons to maintain them and to seek to persuade others of their validity. * * * No inference that any of the defendants knowingly and wilfully conspired as charged in the indictment, or intended to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as cir- [fol. 800] cumstances would permit, may be drawn from the advocacy or teaching of socialism or other economic or political or social doctrines, by reason of any unpopularity of such doctrines or by reason of any opinion you may hold with respect to whether such doctrines, or the opinions or beliefs of any of the defendants, are unreasonable, distasteful, absurd or hateful. * * * The defendants, in common with other persons living under our Constitution, have the right protected by the First Amendment to criticize our system of Government and the Government itself, even though the speaking or writing of such criticism may undermine confidence in the Government or cause or increase discontent. They have the right also to criticize the foreign policy of the United States and the role being played by this country in international affairs; and to praise the foreign policy of other governments and the role being played by those governments in international affairs. * * * The right of the defendants to enjoy such freedom of expression is unaffected by whether or not the opinions spoken or published may seem to you to be crudely intemperate, or to contain falsehoods, or to be designed to embarrass the Government. No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of the United States by force and violence, or of intent to

cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from such expressions alone. * * * Therefore, activities such as membership or officership in the Communist Party, or organization of units of the Communist Party, or recruitment of members, or the circulation of books, articles, magazines and newspapers, or the writing of articles and directives, or the conducting of schools and classes, or going 'underground,' or the use of fictitious names, are not to be considered unless you are satisfied beyond a reasonable doubt from all the evidence in the case that any such activities of the defendants or any of them, as you may find, were carried on as means or methods in furtherance of an object or purpose of the conspiracy alleged in the indictment. * * * No statement or writing of any kind purporting to [fol. 801] declare the principles or theories of the Communist Party, or on any other topic, may be imputed to the Communist Party merely because made by some member, leader or officer of the party, or a teacher of a party school or class, in the course of party activities. * * * The defendants are not being tried to determine what kind of people they are, or what sort of things they would be likely to do if allowed to remain at liberty. Rather it is your duty to determine whether the evidence establishes beyond a reasonable doubt that they did do in the past the things charged in the indictment. * * * As previously stated, the intent required to convict a defendant is not merely the intentional conspiracy to teach and advocate the necessity and duty of overthrowing and destroying the Government of the United States by force and violence. It must also appear beyond a reasonable doubt from the evidence in the case that such defendant had the further specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

Defendants were convicted of something very different from the use of speech, assembly or publication.

Affirmed.

[fol. 802] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13480

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, Frank Efroim Spector, William Schneiderman, Al Richmond, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healy Connelly, Philip Marshall Connelly and Frank Carlson, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—Entered March 17, 1955

Appeals from the United States District Court for the Southern District of California, Central Division.

These causes came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and were duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 803] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Stephens, Fee and Chambers, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING —June 15, 1955

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellants, filed May 16, 1955, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above causes be, and hereby is denied.

[fol. 804] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 805-806] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1955

No. —

OLETA O'CONNOR YATES, ET AL., Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 27

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 13th, 1955.

(Signature illegible), Associate Justice of the Supreme Court of the United States.

Dated this twenty-seventh day of June, 1955.

[fols. 807-808] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, ET AL., Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fols. 809-810] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1955

No. 309

WILLIAM SCHNEIDERMAN, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fols. 811-812] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1955

No. 310

AL RICHMOND and PHILIP MARSHALL CONNELLY, Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY AND FRANK CARLSON FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	6
Statement of the case	6
Argument	10
I. The Smith Act, as construed and applied to the case against these petitioners by the courts below, violates the provisions of the First Amendment with respect to the issues of incitement and clear and present danger. The decision of the Court of Appeals which affirms the judgments of conviction and the rulings of the trial court on these issues, is in conflict with the decision of this court in Dennis	18
A. The rulings of the courts below that the Smith Act punishes advocacy and teaching of the forcible overthrow of the Government with unlawful intent whether in language of incitement to action or not constitutes an unlawful and unconstitutional construction and application of the statute contrary to the decision of this Court in Dennis and a violation of the rights guaranteed petitioners by the provisions of the First Amendment	21
B. The premises which led the courts below to reach a new and different construction of the Smith Act in violation of the Constitution are unsound and should be reviewed	29
C. The failure of the trial court to submit the issue of incitement to the jury, the equation of specific intent with clear and present danger, the exclusion from consideration by the trial court and jury of petitioners' "power to bring about the evil" and the "nature of their activities", all constituted in totality an abdication of the court's duty to determine the issue of "clear and present	

Page

danger'' upon which the application of this statute to petitioners under the Constitution depended 35

II. The interpretation by the courts below of the word ''organize'' as contained in the Smith Act constitutes an erroneous and unconstitutional construction of the statute and presents a new and important question of federal law which should be settled by this Court..... 41

III. The evidence was insufficient to support the jury's verdict that each of the petitioners here knowingly and wilfully joined the conspiracy alleged in the indictment with the specific intent to overthrow the Government of the United States by force and violence as speedily as circumstances would permit. The courts below permitted the jury to return verdicts of guilt upon standards of proof violative of the due process provisions of the Constitution and in derogation of the freedoms protected by the First Amendment..... 47

IV. The construction of the conspiracy statute by the courts below with respect to ''overt acts'' which permitted the jury to draw inferences of an intent to further the objects of the alleged conspiracy from mere speech and assembly was erroneous and violated the provisions of the First Amendment..... 76

V. The refusal of the trial judge to grant petitioners' motions for mistrial based on publication of the ''Long Secret F.B.I. Report'' on the eve of submission of the case to the jury and for a continuance of the trial at its commencement because of publication of ''The Philbrick Story'' deprived petitioners of a fair and impartial trial without due process of law..... 79

Conclusion..... 83

Table of Authorities Cited

Cases	Pages
Abrams v. United States, 250 U.S. 616	14
Association v. Dowds, 339 U.S. 382	24
Baumgartner v. United States, 322 U.S. 665	47, 74, 75
Berger v. United States, 295 U.S. 78	80, 81
Bollenbach v. United States, 326 U.S. 607	26, 27
Boyer v. United States, 132 F. 2d 12 (App. D.C., 1942)	80
Braverman v. United States, 317 U.S. 49	32
Burstyn, Inc. v. Wilson, 343 U.S. 495	75, 78
Cantwell v. Connecticut, 310 U.S. 296	75
C. M. & St. P. Ry. Co. v. Coogan, 271 U.S. 472	72
Cramer v. United States, 325 U.S. 1	76
DeJonge v. Oregon, 299 U.S. 353	19, 24, 74, 78, 83
Delaney v. United States, 199 F. 2d 107 (C.A. 1, 1952)	80, 81, 82
Dennis v. United States, 183 F. 2d 201 (C.A. 2, 1950)	18, 37, 38
Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857	passim
District of Columbia v. Clawans, 300 U.S. 617	55
Fasulo v. United States, 272 U.S. 620	43
Fiswick v. United States, 329 U.S. 211	46
Fletcher v. United States, 158 F. 2d 321 (C.A. D.C., 1946)	55
Flynn v. United States, 216 F. 2d 354 (C.A. 2, 1954), cert. den., 348 U.S. 909	21, 25, 42
Frankfeld v. United States, 198 F. 2d 679 (C.A. 4, 1952), cert. den., 344 U.S. 922	18, 21, 23, 25, 42
Gitlow v. New York, 268 U.S. 652	24
Hartzel v. United States, 322 U.S. 680	37, 47, 74, 75
Herndon v. Lowry, 301 U.S. 242	19, 21, 24, 75, 78
James v. Appel, 192 U.S. 129	43
Joines v. Patterson, 274 U.S. 544	43
Keegan v. United States, 325 U.S. 478	75
Kirsch v. United States, 174 F. 2d 595 (C.A. 8, 1949)	80

Pages

Klapprott v. United States, 335 U.S. 601 ..... 47, 75
Kotteakos v. United States, 328 U.S. 750 ..... 48, 74
Kraus & Bros. v. United States, 327 U.S. 614 27
Krulewitch v. United States, 336 U.S. 440 34

Lauf v. E. G. Shiner & Co., 303 U.S. 323 40
Lonabaugh v. United States, 179 Fed. 476 (C.A. 8, 1910) ... 27
Looney v. Metropolitan R. R. Co., 200 U.S. 480 72

Manning v. Insurance Co., 100 U.S. 693 72
Masses Publishing Co. v. Patten, 244 Fed. 535 24
McNabb v. United States, 318 U.S. 332 83
Mortenson v. United States, 322 U.S. 369 47
Musser v. Utah, 333 U.S. 95 45

N.L.R.B. v. Col. En. & St. Co., 306 U.S. 292 74
Near v. Minnesota, 283 U.S. 697 24

Offutt v. United States, 99 L. ed. Adv. 7 47

Pennekamp v. Florida, 328 U.S. 331 81
People v. Thornton, 63 Cal. App. 724, 219 P. 1020 (1923) .. 41, 43
People v. Thurman, 62 Cal. App. 147, 216 P. 394 (1923) ... 41, 43
People v. Ware, 67 Cal. App. 81, 226 P. 956 (1924) 41, 43
Pierce v. United States, 252 U.S. 239 37

Remmer v. United States, 347 U.S. 227 ..... 79, 80, 81
Rosenman v. United States, 323 U.S. 658 41

St. Paul L. & M. Ins. Co. v. Bachman, 285 U.S. 112 26
Schneiderman v. United States, 320 U.S. 118 ..... 47, 56, 74, 75
Screws v. United States, 325 U.S. 91 26
Shepard v. United States, 290 U.S. 96 73
Shepherd v. Florida, 341 U.S. 50 ..... 80, 82
Spector v. United States, 193 F. 2d 1002 8
Stack v. Boyle, 192 F. 2d 56 8
Stack v. Boyle, 342 U.S. 1 ..... 8, 36, 48, 74
Stack v. United States, 193 F. 2d 875 8
State ex rel. Childs v. School District, 54 Minn. 213, 55 N.W. 1122 (1893) 41
Stromberg v. California, 283 U.S. 359 ..... 19, 24, 46, 78, 84

	Pages
Taylor v. Mississippi, 319 U.S. 583	24, 75
Terminiello v. City of Chicago, 337 U.S. 1	24, 25, 26, 27
Thornhill v. Alabama, 310 U.S. 88	45
Tillinghast v. Richards, 225 Fed. 226 (D.C. R.I., 1915)	77
United Brotherhood v. United States, 330 U.S. 395	26, 27
United States v. Ausmeier, 152 F. 2d 349 (C.A. 2, 1945)	26
United States v. Cardiff, 344 U.S. 174	45
United States v. Dennis, 183 F. 2d 201 (C.A. 2, 1950)	31
United States v. Flynn (D.C. S.D. N.Y., 1953, C. 137-7)	23
United States v. Flynn, 130 F. Supp. 412 (S.D. N.Y., 1955)	55
United States v. Foster, 80 F. Supp. 479 (D.C., 1948)	42
United States v. Foster, 9 F.R.D. 373 (D.C. N.Y., 1949)	31
United States v. Hirsch, 100 U.S. 33	77
United States v. Irvine, 98 U.S. 450	46
United States v. Manne, 84 F. Supp. 785 (D.C. Del., 1949)	80
United States v. Resnick, 299 U.S. 207	43
United States v. Ross, 92 U.S. 281	72
United States v. Schneiderman, et al., 102 F. Supp. 52	8
United States v. Schneiderman, 320 U.S. 118	55
United States v. Shaughnessy, 347 U.S. 260	81
United States v. Spector, 102 F. Supp. 75	8
Von Moltke v. Gillies, 332 U.S. 708	74
Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S.W. 490 (1893)	41
Whitmore v. Cass, 213 S.C. 230, 49 S.E. 2d 1 (1948)	41
Wieman v. Updegraff, 344 U.S. 183	45, 74
Williams v. North Carolina, 317 U.S. 287	46
Williamson v. United States, 194 F. 2d 280 (C.A. 2, 1950)	78
Willis v. Eastern Trust & Banking Co., 169 U.S. 295	43

Constitutions

Constitution of the United States:	
First Amendment	3, 4, 6, 32, 35, 48
Fifth Amendment	4, 5, 6, 32
Sixth Amendment	5, 6

Statutes

Pages

Deering's General Laws, Act 8428, Section 2(4), "Government of the United States", 54 Stat. 670, Title I, Section 2(b) 42, 43

Internal Security Act, Section 4(f) (64 Stat. 991, 50 U.S.C. 783f) 74

Sedition Act of July 14, 1798 (1 Stat. at L. 596, Chap. 74) 14

18 United States Code, 1946 Edition:
- Section 10 ..... 6, 30
- Section 11 ..... 6, 30
- Section 371 ..... 3, 5, 6, 30, 31, 48, 76
- Section 2384 33
- Section 2385 (Smith Act, Section 2) 3, 4, 5, 6, 30, 31, 33, 43, 45, 48

28 United States Code, Section 1254(1) 3

50 United States Code, Section 783(f) 4, 6

Texts

53 Am. Jur., Trial, Section 545, page 434 27

Black's Law Dictionary (Third Edition, 1944) 41

Chafee, Free Speech in the United States (1920), pages 20, 201 74

Chafee, Freedom of Speech (1920), pages 357, 490 55
Page 25 24

Controlling Press and Radio Influence in Trials, 63 Harv. L. Rev. 840 (1950) 80

May, Constitutional History of England, II, pages 275-78 55

Wigmore, Evidence, Third Edition:
- Volume IV, Section 1056 54
- Volume VII, Section 2094 54

Miscellaneous

	Pages
96 Congressional Record 13739, 13761, 14491, 14500	74
House Report No. 304 (80th Congress)	31
House Report 3112 (Conf. Rep.; 81st Cong., 2d Sess.)	74
Senate Report No. 1358, to accompany S. 2311 (81st Cong., 2d Sess.)	74
Senate Report No. 2369, to accompany S. 4037 (81st Cong., 2d Sess.)	74
23 L.W. 2477 (March 29, 1955)	29
New York Times, January 27, 1955, page 12, column 6	35
April 11, 1955, page 3, column 1	35
Webster, New International Dictionary, Second Edition	41

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY AND FRANK CARLSON FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Oleta O'Connor Yates, Henry Steinberg, Loretta Starvus Stack, Frank Efroim Spector, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly and Frank Carlson respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Record p. 802) affirming the judgments of conviction herein of the District Court for the Southern District of California, Central Division.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A) is not yet reported. The written opinions of the District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 737; 106 F. Supp. 892; 106 F. Supp. 906. These opinions are contained in the Appendix herein (App. B).

JURISDICTION.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. The time of petitioners to file petition for rehearing was by order of the Court of Appeals extended to May 16, 1955. A petition for rehearing was duly filed on May 13, 1955, and an order made and entered on June 15, 1955 denying the said petition for rehearing. On the 27th day of June,

1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955 by the order of Mr. Justice Frankfurter. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the refusal of the trial judge, sustained by the Court of Appeals, to give any instructions to the jury to the effect that the law punishes only advocacy and teaching of the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with intent that such teaching and advocacy be of a rule or principle of action resulted in an erroneous construction and application of 18 U.S.C. Sections 371 and 2385 and violation of the provisions of the First Amendment.

2. Whether the courts below erroneously applied 18 U.S.C. Sections 371 and 2385 to these petitioners in violation of the provisions of the First Amendment insofar as the clear and present danger rule is concerned by, separately or in their totality: refusing to submit the question of incitement to the jury for their determination; refusing any judicial evaluation at the trial of the evidence on the question of the nature of petitioners' activities or their power to bring about an attempt to forcibly overthrow the Government; and by equating clear and present danger solely with the intent, of an advocate or teacher of the proscribed doctrine, to forcibly overthrow the Government as speedily as circumstances would permit.

3. Whether the construction of the word "organize" in 18 U.S.C. Section 2385 by the courts below to include "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization," and the application of the statute as construed to these petitioners, was contrary to law and in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the holdings of the courts below, that proof of the advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein were sufficient to sustain a conviction under the instant indictment, established a standard of proof contrary to law, including the provisions of 50 U.S.C. Section 783(f), the provisions of the First Amendment, and the due process provisions of the Fifth Amendment.

5. Whether the holdings of the courts below, that the evidence as to each of the petitioners and the nature of his activities was sufficient to establish the conspiracy alleged in the indictment, his connection with the conspiracy, his specific intent to forcibly overthrow the Government as speedily as circumstances permit and his power to bring about an attempt at such overthrow, and to sustain the conviction, were contrary to law and violated the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

6. Whether the holdings of the courts below which permitted the jury to draw inferences of a criminal intent to further and effect the objects of the conspiracy alleged in the indictment solely from nonculpable speech, press and assembly, or from allegations of overt acts not supported by any evidence, were contrary to law and constituted an erroneous construction of the "overt acts" provisions of 18 U.S.C. Section 371 as applied with 18 U.S.C. Section 2385 to the prosecution of the instant indictment, and were in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

7. Whether the holding of the Court of Appeals sustaining the rulings of the trial judge in refusing to grant a continuance of the trial at its commencement upon the serialized publication of the "Philbrick Story" and in refusing to grant the motion for mistrial upon the publication of the "F.B.I. Report" at the eve of the submission of the case to the jury deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

8. Whether the holding of the Court of Appeals sustaining the refusal of the trial judge to instruct the jury as requested by the petitioners that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved: 18 U.S.C. (1946 Ed), Sections 10, 11; 18 U.S.C. (1948 Ed.), Sections 371, 2385; 50 U.S.C., Section 783(f); and the constitutional provisions involved: First, Fifth and Sixth Amendments, are set forth in the Appendix (App. D).

STATEMENT OF THE CASE.

On July 31, 1951, an indictment was returned against eleven of the petitioners here. The indictment charged in a single count a conspiracy formed on or about April 1, 1945, the date of the reconstitution of the Communist Party, to violate certain provisions of the Smith Act. On September 5, 1951, a similar indictment was returned against the remaining three petitioners here (Spector, Carlson and Dobbs). Motions to dismiss the aforesaid indictments were made upon the principal grounds that the indictments failed to allege, (1) the requisite specific intent to forcibly overthrow the Government as speedily as circumstances would permit; and (2) facts establishing a clear and present danger sufficient to justify an application of the Smith Act to these petitioners. The motions to dismiss were granted. 102 F.Supp. 87. The District Court held that both objections made by petitioners could be met in a new indictment merely by an allegation of specific unlawful intent (p. 96):

> "In the case at bar, the 'clear' danger envisioned in the Smith Act is the act of engaging in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of Government by

means of force or violence. *Dennis v. United States, supra,* 341 U.S. at pp. 499-500, 71 S. Ct. 857.

"The 'present' danger consists in the specific intent of advocate or teacher to accomplish the object of forcible overthrow as speedily as possible. Id. 341 at pp. 508-511, 71 S. Ct. 857."

The view that proof of an accused's advocacy and alleged mental state is sufficient to establish a "clear and present danger" was adhered to by the District Court throughout the trial and on the motions for judgments of acquittal.

A single indictment against the petitioners was returned December 21, 1951 (Clk. R. 2). The new indictment alleged the formation of the consipiracy on or about June 28, 1940 (the date of the enactment of the Smith Act)[1] and charged that petitioners conspired continuously thereafter with each other, with the defendants in *Dennis* (named as co-conspirators, not as defendants in this case), and with persons unknown to the grand jury, to violate Section 2 of the Smith Act, 18 U.S.C. Section 2385, by (1) advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) by organizing, and helping to organize, as the Communist Party of the United States of America, a society of persons to engage in the aforesaid advocacy and teaching, all with the intent of accomplishing the said forceful overthrow as speedily as circumstances would permit. Twenty-three "overt acts"

[1] All other Smith Act indictments directed against members of the Communist Party have alleged the formation of the conspiracy as of 1945, the date of the reconstitution of that Party.

were alleged in the indictment. The "overt acts," alleged to have taken place on various dates between January 31, 1941 and July 24, 1951, consisted of attendance and participation by some of the petitioners at meetings and conventions, and the issuance and circulation of "directives," without allegations as to the content of the meetings or alleged directives. (Clk. R. 2; App. Item 2c, pp. 16-21).[2]

The District Court, prior to trial, denied petitioners' motion to dismiss the new indictment, overruling the plea of the three-year statute of limitations as to the charge of a conspiracy to organize, as the Communist Party of the United States of America, a society of persons who teach and advocate the forcible overthrow of the Government (Clk. R. 10-27). A motion for a bill of particulars which sought, among other things, information as to when the alleged conspiracy commenced and whether the alleged conspiracy to organize as aforesaid was ever consummated was denied *in toto* without opinion (Clk. R. 66-76).

A discussion of the trial proceedings and the evidence follows hereafter in this Statement.[3] Motions by peti-

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[2]Each party filed in the Court of Appeals printed appendices setting forth selected portions of the reporter's record. The appendix to appellants' brief was divided by subject matter into items with each item given a number. The appellants' appendix is referred to herein as "App. Item " followed by the number of the item and the page numbers in said appendix.

[3]Prior to trial, the petitioners were confined to jail for approximately four and one-half months before reasonable bail was granted (*Stack v. Boyle,* 192 F.2d 56; *Stack v. Boyle,* 342 U.S. 1; *United States v. Schneiderman, et al.,* 102 F.Supp. 52; *United States v. Spector,* 102 F.Supp. 75; *Stack v. United States,* 193 F.2d 875; *Spector v. United States,* 193 F.2d 1002). The same trial judge presided at the bail proceedings and at the trial herein.

tioners for judgments of acquittal at the close of respondents' case and at the conclusion of the entire case were denied (106 F. Supp. 906, 920-924; R. 9384-9993, 10076-10077, 12569-12576, 13915-14072).[4]

The case was submitted to the jury by the District Court without any finding of "clear and present danger," other than the Court's holding that the individual specific intent had been sufficiently established for submission to the jury. In its written opinion, the District Court held that the clear and present danger rule is intended to serve as the standard to be applied in testing the constitutionality "on its face" of a statute which restrains freedom of expression, and that in determining "whether the statute is constitutionally applied to a given case, the 'clear and present danger' rule furnishes the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused." (106 F. Supp. 906, 923).

Both the petitioners and respondent requested the District Court to instruct the jury that they could not return a verdict of guilt unless the jury were satisfied beyond a reasonable doubt that the petitioners conspired as alleged in the indictment with the intent that their alleged teaching and advocacy be of a rule or principle of

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[4]The exhibits admitted into evidence exceeded 500 in number and included many full length books. The Court of Appeals pursuant to stipulation of the parties and its order based thereon considered the exhibits on appeal in their original form without printing or reproduction. Copies of the reporter's transcript were prepared by a process known as photo offset printing and these copies were by order of the Court of Appeals accepted as the reporter's record on appeal without further printing. The letter "R" refers to the photo offset copies.

action and by language reasonably and ordinarily calculated to incite persons to such action (Pet Prop. Inst. Nos. 25, 29, 51, App. Item 2 (q), pp. 69, 73-4, 76; Resp. Prop. Inst. No. 21, Supp. App. Item 28, pp. 35-6).[5] The District Court declined to give the jury any instruction on "incitement". The District Court expressed the view that in *Dennis*, this Court held that advocacy of forcible overthrow of the Government with intent to accomplish such overthrow as speedily as circumstances would permit had been constitutionally proscribed by Congress. Whether such evidence "is of the degree that amounts to incitement, whether it is something else, might be one way of characterizing the evidence, but I don't think it would help here", stated the District Court (R. 9693). The District Court thought that the question of "incitement" may "have been important in the Dennis case, but I think that question is laid at rest by the Dennis case" (R. 9693). In the District Court's view, the question was merely one of quantum of proof. "What is the language that is incitement to action? That means anything at all to me. I don't know what it would mean to the jury" (R. 12441-3). The District Court held that the question for the jury was whether there was an agreement to advocate and teach the forcible overthrow of the Government with the proscribed intent, "whether it is language of incitement or not" (R. 12443).

The District Court instructed the jury over petitioners' objections: "The verb 'organize' as used in the Smith Act and the indictment, includes the recruiting of

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[5] "Supp. App." refers to the supplemental appendix filed in the Court of Appeals by petitioners together with their reply brief.

new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" (App. Item 2(g), pp. 36-7). The Court declined to instruct the jury as requested by petitioners: "To 'organize' means to furnish with organs, to give an organic structure to. To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size." (Pet. Prop. Inst. 34, Item 2(g), pp. 37-8).

In the courts below petitioners repeatedly contended that the evidence was insufficient to establish petitioners' intent or connection with a conspiracy as charged in the indictment.[6] In the Court of Appeals both petitioners and respondent set forth in their briefs detailed statements of all the evidence in the record as such evidence related specifically to each of the petitioners herein. These statements, as set forth in respondent's brief below, are appended to the petition here (App. C), with only such interpolations and italics as will help to clarify a reference

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[6]Petitioners rely on the language of this Court in *Dennis*: "Where there is doubt as to the intent of defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U.S. at 516. When this specific language was called to the attention of the trial judge on motions for judgment of acquittal, the trial judge stated: "This does not mean a thing to me, Mr. Margolis. With all deference, it is not understandable to the lawyer. They are words; they are very kind words and they are all right. I have no quarrel with them at all, but they do not mean a thing in my view to advance the holding in the case . . . but we must remember that the justices of the Supreme Court . . . write a great many words, sometimes that are not necessary to the decision." (R. 9680).

to the record, correct an error, or avoid an apparent distortion.

The evidence relating directly to the individual petitioners establishes that each of them had been a member of the Communist Party for many years and had held some office in the Party, for the most part on a local level. (Of the eleven petitioners, five never held an office above the city or county level and four never held one above the state level.) On the issue of advocacy of force and violence the record contains nothing more than evidence of a few unrelated diverse and unequivocal statements made by several of the petitioners outside the presence and without the knowledge of most of the others. Our Appendix E summarizes in tabular form the positions held by each petitioner in the Communist Party and the evidence from which it is claimed that any inference could be drawn of adherence to doctrines of force and violence. This evidence consists of utterances, verbal or written, relating to revolution and of utterances and the use of books dealing with Marxism and Leninism. The table indicates which of the utterances and of the use of books were ascribed directly to each petitioner and which of them were related to him by reason of his presence at public or private meetings at which the statements were made or the books used by others.

The Court of Appeals discussed only the evidence relating to one petitioner, Henry Steinberg. It held that the evidence was sufficient against him in all respects and that the evidence as to all of the petitioners was equally sufficient. Petitioner Steinberg was shown to have been a member of the Young Communist League

as early as 1936 and of the Party in 1940, at which time he was the "practical politician" of the Party (A. 247-8). He held the following positions in the Party; in 1946 or 1947, Educational Director for Los Angeles County (A. 138-9); in 1950, Legislative Director of Los Angeles County (Ex. 517; A. 455).

There is no evidence in the record tying petitioner Steinberg into any advocacy of force and violence and there is none relating to any reading or discussion of Marxism-Leninism by him or of his understanding thereof. In the opinion of the Court of Appeals there is reference to only one specific item of evidence, summarized in the opinion as follows:

> "To take one example, the indictment charged, as mentioned above, one such act in the following language:
>
> > 'On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting.'
>
> The proof showed that the meeting was called for several purposes, as outlined below. Steinberg made a number of speeches there, and stated that 'this was a Lenin Memorial meeting,' at which he presided. An announcement of the meeting in the People's World asked persons to attend and 'demonstrate for the Bill of Rights' as it would 'serve primarily as a protest against the current trial in New York of twelve national leaders of the party.' There was no question about the facts, which were uncontroverted, if the jury believed the testimony." (Appendix A, p. 23).[7]

[7]Appendix A contains the opinion of the Court of Appeals below.

This evidence was held to constitute sufficient evidence of petitioners' intent and connection with the alleged conspiracy as well as proof of an overt act. It should be emphasized that the aforesaid was all the evidence against petitioner Steinberg. To set forth the detailed evidence relating to each of the other petitioners would unduly prolong the statement of the case. The specific evidence as to each petitioner will be discussed in the portion of the argument, Point III, dealing with the sufficiency of the evidence. And as noted above the respondent's complete summary thereof can be found in Appendix C and a quick view of all the material evidence as to each petitioner can be obtained in chart form in Appendix E.

The evidence with respect to petitioner Steinberg, discussed by the Court below and held sufficient to provide the basis for inferences establishing every element of the crime charged without overreaching the limitations of the First Amendment, sharply poses several of the issues of law presented by this petition. In this connection it is interesting to note that the Court of Appeals indicates in its opinion that the constitutional questions posed by this case are the same as those which were raised by the Sedition Law of 1798 (App. A, 41-2). Assuming the constitutionality of the latter the Court holds that the convictions here must stand on the same principles.[8]

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[8]Cf. "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the courts. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798 (1 Stat. at L. 596, Chap. 74) by repaying the fines that it imposed." Mr. Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 630.

Evidence was introduced with respect to only two of the overt acts charged to have taken place within three years of the indictment. They both involved public Lenin Memorial meetings. At one the subject matter of the meeting was a protest against the prosecution in the *Dennis* case (see supra p. 13). At the other petitioner Schneiderman spoke upon "the subject matter of the event being a Lenin memorial" (R. 8063). A subsequent issue of the People's World (Ex. 159-A) stated that nearly 2000 persons had attended the meeting, that appellant Schneiderman spoke on the "China situation", that China was seen as the "key issue for 1950"; that the people demand to know the stand of Senator Downey and Congresswoman Douglas "on the vital issue of whether they support trade and recognition for the new China, or armed intervention" (R. 8057-66).

The Court declined to instruct the jury "that if the evidence is as consistent with the hypothesis that the 'overt act' is merely the exercise of speech, press, and assembly as with the intention to advocate and teach or accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit", then the "overt act" cannot be said to have been proven to be in furtherance of the alleged conspiracy beyond a reasonable doubt (App. Item 2(e), pp. 25-6). The District Court refused to instruct the jury that mere proof of participation "in the Communist Party's lawful activities" was not proof of an "overt act"; that if the proof showed no more than the exercise by petitioners "of lawful discussion by speech and press", and "peaceable assembly and association to

seek redress of grievances", then the "overt acts" had not been established (Pet. Prop. Inst. 39, 40, 41, 42, 43, 44; App. Item 2(e), pp. 26-9).

The District Court simply instructed the jury that an "overt act" under the indictment herein "need not be criminal in nature", and may be "as innocent as the act of a man walking across the street", so long as the "act" tends to accomplish the plan or agreement and is knowingly done in furtherance of "an object or purpose of the conspiracy charged in the indictment" (App. Item 2(e), pp. 24-5).

On the afternoon of July 29, 1952, just as counsel for petitioner concluded their final arguments to the jury and on the eve of arguments by respondent counsel, there appeared in the press and on radio and television, announcements that "a long secret FBI report" had just been released purportedly proving that the Party advocates and teaches the overthrow and destruction of the Government of the United States by force and violence. Before the day's proceedings had ended and before the jury had left the courtroom, there were already being sold at every exit of the Federal Court Building issues of the Herald-Express, an evening newspaper distributed in Los Angeles (circulation 305,056), with banner headlines printed in red, reading, "FBI Bares Stalin U. S. Revolt Plot". The article itself was headed, "Armed Revolt Plot Told" (Ex. NG R. 13647).

Throughout the evening, announcements of a similar nature emanated from all radio and television stations in the Los Angeles area. The commentators on radio and television emphasized that the "long secret FBI report"

revealed that Russian Premier Stalin had decided that Communists can climb to power in the United States only by "forcible destruction" of the Government—never by peaceful means; that the purpose of the FBI report, heretofore considered "highly confidential" was to set forth "documentary proof that the Communist Party, U.S.A. teaches and advocates the overthrow and destruction of the United States Government by force and violence" (Ex. NG R. 13647).

On the morning of July 30, 1952, the banner headline of the Los Angeles Times (circulation 396,112) read: "Stalin Plan to Conquer U. S. Told in FBI Report." The Mirror (circulation 202,325) carried the headline: "FBI Reports Reds Seek to 'Kill' U. S." (Ex. NG R. 13647).

This publicity was predicated on a report which had been prepared by the FBI and turned over to Senator McCarran in June 1952 and then released by the Senator to the press on the day that appellants were finishing their final arguments to the jury (Ex. NF R. 13646; App. Item 78, pp. 301-6). Petitioners immediately moved for a mistrial (Ex. NG R. 13647, Ex. NF R. 13645-7). The District Court indicated that it was willing to put one and only one, compound question to the jury as to whether they had seen or heard this story and if so, whether it had affected them in such a way that they would disregard their sworn duty to decide this case solely upon the evidence adduced, the jurors' answers to this one question to be accepted as final by the Court. Petitioners objected to this procedure. The Court put no question at all and denied the motion for a mistrial (R. 13, 691-13,

724). An instruction to the jury directing it specifically to disregard these publications was refused (Def. Prop. Spec. Inst., Ex. NH App. Item 2(q), p. 69).

A few days before the case went to trial, the Los Angeles Times commenced the publication of a serialized story entitled "I Led Three Lives" by one Herbert Philbrick. The announcement was in banner headlines, and described Philbrick as one "whose electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11'". Readers were informed that "he reveals how the Communists intend to overthrow the U. S. Government and when". A motion for a continuance until 60 days after the conclusion of the publication was denied (R. 987-8).

The trial judge instructed the jury that in evaluating testimony given by former members of the Party, consideration should be given to their possible hostility to the defendants or the Party (Inst. No. 6B, App. Item 1, p. 10). Most of the principal prosecution witnesses had joined the Party as paid FBI agents. Accordingly the petitioners requested, but the trial Court refused, an instruction that the testimony of these witnesses should be scrutinized closely and acted upon with caution (Proposed Inst. No. 70, App. Item 2(q), p. 80).

ARGUMENT.

The Court of Appeals has rendered a decision in conflict with decisions of the Court of Appeals in *Dennis v. United States*, 183 F. 2d 201 (C.A. 2, 1950), and *Frank-*

feld v. United States, 198 F. 2d 679 (C.A. 4, 1952) on the same matters; has decided important questions of federal law which have not been, but should be, settled by this Court; has decided federal questions in conflict with the decisions of this Court in *Dennis v. United States,* 341 U.S. 494, *DeJonge v. Oregon,* 299 U.S. 353, *Herndon v. Lowry,* 301 U.S. 242, *Stromberg v. California,* 283 U.S. 359, and other applicable decisions of this Court; and by its decision and judgment has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

I.

THE SMITH ACT, AS CONSTRUED AND APPLIED TO THE CASE AGAINST THESE PETITIONERS BY THE COURTS BELOW, VIOLATES THE PROVISIONS OF THE FIRST AMENDMENT WITH RESPECT TO THE ISSUES OF INCITEMENT AND CLEAR AND PRESENT DANGER. THE DECISION OF THE COURT OF APPEALS WHICH AFFIRMS THE JUDGMENTS OF CONVICTION AND THE RULINGS OF THE TRIAL COURT ON THESE ISSUES, IS IN CONFLICT WITH THE DECISION OF THIS COURT IN DENNIS.

In *Dennis v. United States,* 341 U.S. 494, 502, this Court stated that although the application of the Smith Act to the defendants in the *Dennis* case had resulted in convictions for the teaching and advocacy of the forcible overthrow of the Government, coupled with the intent to accomplish that overthrow, still "an element of speech" was involved. "For this reason, we must pay special heed

to the demands of the First Amendment marking out the boundaries of speech."

The statute was held properly construed and applied in the light of the requirements of the Constitution upon proof beyond reasonable doubt that (1) each of the accused knowingly and wilfully conspired to advocate and teach the overthrow of the Government of the United States by force and violence and to organize as the Communist Party of the United States a society, group or assembly of persons who so teach and advocate (p. 496-7); (2) each of the accused conspired as aforesaid with the specific intent to overthrow the Government of the United States by force and violence as speedily as circumstances would permit (pp. 499-500, 515-16); (3) each of the accused so unlawfully conspired with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action (pp. 511-13); and that (4) the aforesaid conspiracy accompanied by such specific unlawful intents, involving defendants proven to have the "power to bring about the evil" coupled with "the inflammable nature of world conditions", justified a finding of "clear and present danger", as defined by this Court, of an attempt to overthrow the Government of the United States by force and violence (pp. 502-11).

All of the aforesaid criteria were either abandoned or undermined by the courts below in the instant case. The Smith Act, as construed and applied in the instant case, "amounts merely to a dragnet which may enmesh anyone" who advocates and teaches basic social, economic or

political changes. *Herndon v. Lowry*, 301 U.S. 242, 263. The construction and application of the courts below are in fundamental conflict with the construction and application of the statute made by this Court in *Dennis* and by the Courts of Appeal in *Frankfeld v. United States*, 198 F. 2d 679 (C.A. 4, 1952). Cert. den. 344 U.S. 922 and *Flynn v. United States*, 216 F. 2d 354 (C.A. 2 1954) Cert. den. 348 U.S. 909.

A. The rulings of the courts below that the Smith Act punishes advocacy and teaching of the forcible overthrow of the Government with unlawful intent whether in language of incitement to action or not constitutes an unlawful and unconstitutional construction and application of the statute contrary to the decision of this Court in Dennis and a violation of the rights guaranteed petitioners by the provisions of the First Amendment.

1. On at least three separate occasions, the trial judge instructed the jury that they could convict petitioners if they found that petitioners knowingly and wilfully joined the conspiracy alleged in the indictment with the proscribed mental state (Instructions 11-I, 14 and 14-H; App. Items 2(f), (h) and (l), pp. 29, 40 and 53-4). The refusal to instruct the jury on the question of "incitement to action" was intentional and over the specific objection of petitioners on motions for judgment of acquittal (R. 9393); and with respect to petitioners' proposed instructions (Nos. 25, 29, 51; App. Item 2(q), pp. 69, 73-4, 76). Moreover, respondent itself requested the trial judge to instruct on the issue, employing the language of Judge Medina's instruction in *Dennis* (Supp. App. Item 28, pp. 35-6). None of the instructions was given.

More than a mere failure to give requested instructions is involved here. The proper construction and application of a statute in the light of the requirements of the Constitution is in issue. In *Dennis*, the trial judge instructed the jury "in further construction and interpretation of the statute" that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. 9 F.R.D. 367, 391. Judge Learned Hand thought that the Smith Act was constitutional "as the judge construed it" (183 F. 2d 201, 207). Judge Chase, in his concurring opinion, stated that the construction of the Act was "demanded" in the light of prior decisions by this Court and to avoid constitutional difficulties. On certiorari to this Court, respondent in *Dennis* quoted in its brief in full only the instructions of the trial judge on "incitement" (pp. 165-8). In this Court, Chief Justice Vinson wrote that the instructions of the trial judge called for the jury to find the facts "essential" to establishing the substantive offenses which defendants allegedly conspired to commit. 341 U.S. 494, 512. Justice Frankfurter held that the "judge's charge (that the act is directed at advocacy of "a rule of action, by language reasonably calculated to incite persons to such action") properly explained to the jury what it is that the Smith Act condemns" (p. 518). Justice Jackson expressed the view that the statute proscribed "direct incitement" to action and accordingly could support a conviction without proof of clear and present danger (pp. 571-2).

Our reading of the concurring opinion of Mr. Justice Frankfurter, leads us to the conclusion that the distinction between discussion and incitement is at the heart of that Justice's concurrence. He noted (p. 544) that the "jury (in *Dennis*) has found that the object of the conspiracy is advocacy as 'a rule or principle of action', 'by language reasonably and ordinarily calculated to incite persons to such action', and with the intent to cause the overthrow 'as speedily as circumstances would permit'.

"On any scale of values which we have hitherto recognized, speech of this sort ranks low."

In the instant case the jury was not required by the trial Court to make any such findings; and that jury did *not* make such a finding.

Judge Dimock in *United States v. Flynn* (D.C.S.D.N.Y. 1953 C. 137-7), specifically instructed the jury that the defendants could not be found guilty of the offense absent the intent that the teaching and advocacy invoked "be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action". In *Frankfeld v. United States*, 198 F. 2d 679, 687 (C.A. 4, 1952), the Court of Appeals quoted with approval the instruction of Judge Chesnut that advocacy of violent revolution is not unlawful so long as it "does not go to the extent of advocating action for the accomplishment of a violent revolution by language reasonably and ordinarily calculated to incite persons to such action".

There is no relevant decision of this Court which has failed to stress the distinction between statutes which permit the punishment of expressions of ideas and those which are limited to incitement to violence and crime.

Stromberg v. California, 283 U.S. 359, 369; *Near v. Minnesota,* 283 U.S. 697, 716; *Gitlow v. New York,* 268 U.S. 652, 661-5; *DeJonge v. Oregon,* 299 U.S. 353, 363-6; *Herndon v. Lowry,* 301 U.S. 242; 261; *Taylor v. Mississippi,* 319 U.S. 583, 589; *Terminiello v. City of Chicago,* 337 U.S. 1, 4; *Association v. Douds,* 339 U.S. 382, 394. Professor Chafee states: "The real issue in every free speech controversy is this—whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law." *Freedom of Speech* (1920) p. 25. In *Masses Publishing Co. v. Patten,* 244 Fed. 535, 540, Judge Hand noted: "Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists."

The trial judge here clearly and unmistakably excluded the issue of "incitement to action" from the case. The jury was left free to convict the petitioners even if they allegedly conspired to advocate and teach in the future, the abstract doctrine of the forcible overthrow of the Government without incitement to action. The Smith Act was thus construed so as to permit the jury to convict even if petitioners allegedly conspired to advocate and teach the proscribed doctrine in language which was merely provocative or challenging or stirring or disputatious. The Smith Act as thus construed and applied

is in conflict with the decisions of this Court and is unconstitutional. *Dennis v. United States*, 341 U.S. 494, 501-3, 511-13, 516, 548-9; *Terminiello v. City of Chicago*, 337 U.S. 1.

2. The opinion of the Court of Appeals recognizes the plain state of the record as made by the trial judge and concludes that the requested instructions were unnecessary (Appendix A, pp. 6, 7). The instant indictment, it is stated, "by its inherent terms charged not only that the language of incitement was used, but it was used in order that the proscribed doctrine should become a rule of action" (id., p. 16). There is nothing in the language of this indictment which suggests that "incitement to action" is inherently contained therein. This Court in *Dennis*, and the courts in *Flynn* and *Frankfeld* emphasized that the abstract doctrine of the forcible overthrow of the Government is not interdicted by the Smith Act. A charge that an accused advocated the overthrow of the Government by force and violence does not preclude advocacy of that abstract doctrine and cannot, therefore, "inherently" connote that the accused so advocated with the intent that such advocacy be of a rule or principle action and by language reasonably and ordinarily calculated to incite persons to such action. It was precisely for this reason that this Court approved the "essential" instructions of Judge Medina in "further construction and interpretation of the statute."

Assuming that the element of incitement was "inherent" in the indictment, the duty rested upon the trial judge to instruct the jury clearly and unequivocally on the issue. As this Court noted in *Dennis*, the issue is one of the

most important "questions of fact" which the jury in a Smith Act prosecution has to decide, for upon the determination of that issue rests the power or lack of power of the court to apply the law to the accused in the light of the protective guarantees of the Constitution. Where the Constitution or the Congress prescribes standards affecting the conduct of persons, an accused is entitled to have the jury instructed in accordance therewith. *United Brotherhood v. United States,* 330 U.S. 395; *Bollenbach v. United States,* 326 U.S. 607; *Screws v. United States,* 325 U.S. 91, 107; *Terminiello v. City of Chicago,* 337 U.S. 1; *St. Paul L. & M. Ins. Co. v. Bachman,* 285 U.S. 112.

Another reason advanced by the Court of Appeals to justify the failure of the trial judge to instruct on the question of incitement was the view "that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute" (Appendix A, p. 32). If the "criminal design" involved advocacy by language reasonably and ordinarily calculated to incite persons to action, the petitioners were obviously entitled to have the judge charge, in unmistakable language, that no petitioner here could be found guilty unless he was a party to such a criminal design. *United States v. Ausmeier,* 152 F. 2d 349, 356 (C.A. 2, 1945). If there was no such "criminal design", the mere fact that one of the accused entered the "field of action" would not make criminal the agreement which was not criminal in its inception.

3. In the Court of Appeals, respondent, confronted by the trial judge's specific exclusion of the question of incitement from the case, argued that "we must assume" that the jury could not have found that petitioners intended their advocacy "would be in language less compelling than that which would incite persons to action" (Res. Br. pp. 351-3). The Court of Appeals, after quoting extracts from the trial judge's instructions, adopted a similar view: "Defendants were convicted of something very different from the use of speech, assembly or publication" (Appendix A, pp. 42-46).

That a trial judge must instruct on all essential questions of law involved in a case is of course settled. The judge may not transfer to the jury the judge's function in giving the law, nor may an Appellate Court assume the jury's function of measuring the evidence by appropriate legal yardsticks. The Court is required to instruct what the law condemns without offending the Constitution; not what the Constitution permits even if the law were nonexistent. On a basic issue of fact, an instruction should be so plain that no doubt can arise as to its meaning. *United Brotherhood v. United States,* 330 U.S. 395; *Bollenbach v. United States,* 326 U.S. 607; *Terminiello v. City of Chicago,* 337 U.S. 1; *Kraus & Bros. v. United States,* 327 U.S. 614, 627; 53 *Am. Jur.,* "Trial" Section 545, p. 434.

The jury was instructed that it could convict if it found that petitioners committed the broad offense alleged in the indictment. 106 F. Supp. 906, 933-34, 936, 938. The jury was not told that the Smith Act does not punish the advocacy or teaching of the abstract doctrine

of forcible overthrow of the Government; that the law punishes only advocacy and teaching of such proscribed doctrine as a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, nor was any equivalent language used in the trial judge's instructions. The matter was entirely excluded from the jury's consideration because of the fundamental conflict in the construction of the statute by the courts below and this Court in *Dennis*.

"Advocacy", the jury was instructed, is the same as "urge" *or* "plead in favor of" *or* "support, vindicate, or recommend publicly". "Teach" means "to instruct", "show how", *or* "guide the studies of" (106 F. Supp. 906, 934). *Any such advocacy or teaching* of the forcible overthrow of the Government with the requisite specific intent was sufficient, under the instructions, to justify a conviction. It is submitted that the jury could not be expected to understand under such instructions that a conviction would only be justified under the statute if there was proof beyond a reasonable doubt that each of the petitioners knowingly and wilfully joined a conspiracy to advocate and teach the proscribed doctrine in language of incitement to action. Nor could this understanding be obtained from instructions which informed the jury that petitioners may advocate "socialism" or any other "economic or political or social doctrines", or "criticize our system of Government" or "foreign policy" in "crudely intemperate language" (106 F. Supp. 906, 935). Nor was anything added by the negative definition that advocacy or teaching does not include prediction or prophecy, or that any advocacy or urging which did not

include the use of force and violence as a means of overthrowing the Government was not within the issue of the indictment. Because the jury was never told that the "advocacy" or "urging" or "pleading" or "recommending" of the proscribed doctrine must be of a rule or principle of action in language calculated to incite persons to such action, it was left free to convict solely because of "the use of speech, assembly or publication".[9]

The rulings of the Courts below violate basic provisions of the Constitution and are in direct conflict with the principles enunciated by this Court in *Dennis*. Such definitive decisions, if not reviewed by this Court, will have serious and harmful results not only in Smith Act prosecutions involving conspiracy charges as well as charges of substantive violations, but will necessarily affect prosecutions under all other federal, state and local laws relating to the exercise of First Amendment rights.

B. The premises which led the Courts below to reach a new and different construction of the Smith Act in violation of the Constitution are unsound and should be reviewed.

(1) It appears to be the view of the Court of Appeals that the indictment in *Dennis* did not plead a "standard" conspiracy (as Mr. Justice Jackson erroneously assumed, according to the Court below); that "it is clear" from the

[9]The editors of United States Law Week construe the opinion of the Court of Appeals as follows: "Smith Act indictment charging that defendants have conspired, with specific objective of causing forcible overthrow of Government, to organize group dedicated to advocacy and teaching of such overthrow adequately defines criminal conspiracy *even if planned advocacy and teaching are protected by First Amendment.*" 23 L.W. 2477 (March 29, 1955).

opinion of the other Justices of this Court that "a true conspiracy charge was not involved" (Appendix A, p. 12). In *Dennis*, states the Court of Appeals opinion, "mere membership or officership in the Communist Party, insofar as that organization was shown by the evidence to teach the proscribed doctrine, might have been taken as proof against the individual defendant of joint action with others to bring about the end intended" (id., p. 5); and this Court in *Dennis*, is said to have "applied the law without any of the limitations set up by the precedents which have been developed under Section 371 (the general conspiracy statute, 18 U.S.C.A. 371)" (id., p. 12).

On the other hand, states the Court below, since the decision in *Dennis* there have been "changes in the basic law" (id., p. 7), "by far reaching legislation" and, as a result, "there are vital distinctions between this case and those which have been previously ruled upon" (id., p. 7). It appears that the "vital distinction" is that *Dennis* was decided under 18 U.S.C. (1946 Ed.), Sections 10 and 11, while the instant case was tried under 18 U.S.C. (1948 Ed.), Sections 371 and 2385. Therefore, Congress discarded the "vague 'conspiracy' clause of the original statute", and made possible use of "the standardized body of law with which the profession was familiar" under a "specific enactment proscribing conspiracy as a substantive offense" (Appendix A, p. 11).

As a result of this change in the "basic law", certain "striking phrases given currency in the trial of the Dennis case" need no longer be used "in all future cases" (id., p. 4). The instructions of the trial judge in *Dennis* requiring the jury to find "language of incite-

ment" and intent that the advocacy or teaching be of a "rule of action" appear to the Court below to have been only "precautionary instructions" because the then statute required "neither proof of overt acts nor a specially planned objective" (id., p. 6). However, under the present "conspiracy statute", admonitions to a jury in such language have become "supererogatory" (id., p. 7).

There is no basis for the distinction which the Court below seeks to draw. There is nothing to indicate that the 1948 version and codification of the Criminal Code was intended by Congress to create any "basic changes" with respect to a charge of conspiracy to violate the Smith Act. 80th Congress House Report No. 304. The Reviser's Note to Section 2385 of Title 18 U.S.C. states that "the phraseology was considerably changed to effect consolidation but without any change of substance". The Reviser's Note to Section 371 of 18 U.S.C. states "that a number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section".

Moreover, in *Dennis* as in the instant case, the gist of the offense charged was the alleged conspiracy to advocate and teach the forcible overthrow of the Government, and to organize as the Communist Party a society of persons for such purpose. The conspiracy was no less "standard" in *Dennis* than it was here. *Dennis v. United States*, 341 U.S. 494, 511, 517, 544; 572, 579, 582; *United States v. Dennis*, 183 F. 2d 201, 230, 235 (C.A. 2, 1950); *United States v. Foster*, 9 F.R.D. 373, 376-78 (D.C.N.Y. 1949).

The only effect of the 1948 revision of the Criminal Code was to make the general conspiracy statute with its requirement of allegation and proof of overt acts applicable to prosecutions under the Smith Act. This additional requirement is what the Court below denominated a "deep gulf between the situation here and that in the Dennis case" (Appendix A, p. 14). This Court did not construe and apply the Smith Act in *Dennis* as it did because the indictment did not allege "overt acts" (pp. 497-498, 510-11). The requirement that there be allegation and proof of an overt act to further and effectuate the objects of an alleged conspiracy has important historical roots and is undoubtedly a salutary requirement in the prosecution of this "mental crime", but "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects . . . it is in either case that agreement which constitutes the conspiracy which the statute punishes". *Braverman v. United States*, 317 U.S. 49, 53. The conclusion, therefore, that the nature of the offense charged herein was basically different from the offense charged in *Dennis* so as to justify an interpretation and construction of the statute which disregards constitutional limitations imposed by the First and Fifth Amendments is without foundation.

2. In the view of the Court of Appeals, not only are the statutes different in *Dennis* and in the case herein, but the indictments are also fundamentally distinct. It appears that a "chemical change was wrought" (Appendix A, p. 15) when, upon motion of petitioners, the original indictments were dismissed and a new indictment returned

with the allegation of specific intent of causing the forcible overthrow of the Government "as speedily as circumstances would permit". In *Dennis*, this Court held that the structure and purpose of the Smith Act demand the inclusion of intent as an element of the crime (p. 499). The trial judge here out of "caution added to grave doubt" (102 F. Supp. 87, 97) required the prosecution to add explicitly to the indictment that which was implicitly imbedded in the *Dennis* indictment. Clearly, this did not change the essential character of the offense nor bring about a "vital metamorphosis" (Appendix A, p. 15).

3. Although the Court of Appeals recognized that the case herein was tried on the theory that "this was a conspiracy to violate the Smith Act", still it appears to the Court below that only "purists might find a difference" between a conspiracy to advocate and teach the forcible overthrow of the Government with intent to accomplish that overthrow as speedily as circumstances permit (18 U.S.C. Section 2385) and conspiracy to forcibly overthrow the Government (18 U.S.C. Section 2384), (id., p. 15, note 9). It is stated that "the latter statute which was mentioned in the *Dennis* case (pp. 581-2) might well be applicable to the indictment here" (id.). This may explain such language in the opinion as "if conspirators *to commit a crime of violence* are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained" (id., p. 16).

The petitioners here were not charged with a conspiracy to forcibly overthrow the government. Affirmance of the judgments of conviction on such theory would be a

sheer denial of due process. The Court below appears to assume because the indictment alleged the proscribed mental state that therefore the objects of the conspiracy alleged in the indictment were enlarged to include actual forcible overthrow of the Government. The administration of criminal justice would become "at large" if a specific conspiracy with defined objects alleged in an indictment were to be stretched to include the subjective motives of the alleged conspirators. Cf. *Krulewitch v. United States,* 336 U.S. 440; 443-4, 456-7.

4. Similar fundamental misconceptions bottomed the rulings of the trial judge below which are discussed in the argument hereafter.

It is respectfully submitted that the conclusions of the Courts below were based on premises wholly unsupported in law or fact. In addition to the serious constitutional errors which flowed from the misconceptions in this case, it should be noted that the reasons given by the courts below for their rulings raise important questions in the administration of the Smith Act and criminal justice in the Federal Courts as to call for this Court's review and exercise of its power of supervision. The concept of a "new Smith Act" and "standard conspiracy" without the issue of "incitement" injects novel elements into future prosecutions which may confuse and puzzle prosecutors and defense counsel, as well as judges and juries, alike. In the light of the recent announcements by the Department of Justice that a host of new Smith Act prosecutions are immediately contemplated, the issues involved in the instant proceedings become of crucial im-

portance. *New York Times,* January 27, 1955, p. 12, col. 6; *New York Times,* April 11, 1955, p. 3, col. 1.

C. The failure of the trial Court to submit the issue of incitement to the jury, the equation of specific intent with clear and present danger, the exclusion from consideration by the trial Court and jury of petitioners' "power to bring about the evil" and the "nature of their activities", all constituted in totality an abdication of the Court's duty to determine the issue of "clear and present danger" upon which the application of this statute to petitioners under the Constitution depended.

1. In *Dennis,* Judge Hand stated that "it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact" (183 F. 2d 201, 215), upon which the question of law to be decided by the Court was dependent, and that in the application of the "clear and present danger" standard, as defined, courts "may strike a wrong balance; they may tolerate 'incitements' which they should 'forbid'; they may repress utterances they should 'allow' but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights" (id., p. 212). This Court in *Dennis* held that "when facts are found" by the jury that establish the violation of the statute, then the application of the statute under the First Amendment becomes a matter of law, and the determination of this question depends upon the judicial "application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction" (341 U.S. 494, 514-15). This Court emphasized: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to

bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution'' (p. 516), reiterated in proceedings affecting the case herein. *Stack v. Boyle*, 342 U.S. 1, 5.

2. The failure of the trial Court to submit to the jury the issue of ''incitement'', approved by the Court of Appeals, resulted in the absence of a jury finding essential to the determination of ''clear and present (or probable) danger''. It made any finding on ''clear and present danger'' by the courts below legally impossible. Without an appropriate holding of ''sufficient danger'', denial of the motions for judgments of acquittal was invalid under the Constitut n.

3. The Court of Appeals was in error when it stated that the ''trial judge did not rule that clear and present danger could be found to exist simply upon the basis of the possession of the proscribed intent'' (Appendix A, p. 33).

The trial judge twice stated in written opinions that the ''clear and present danger'' envisioned in the Smith Act is the ''intent (of the advocate) to bring about ultimately the overthrow of Government by means of force and violence as speedily as possible'', 102 F. Supp. 87, 96; 106 F. Supp. 906, 923. This was the only ruling on clear and present danger made by the trial judge in the case. Contrary to the view of the Court of Appeals, petitioners were not seeking a ''comment'' by the trial Court to the jury on the evidence (Appendix A, p. 30). Petitioners were seeking a necessary determination of law on the evidence.

The errors of the Court of Appeals appear to flow from its agreement with the trial Court that proof of an alleged conspiracy to advocate and teach the proscribed doctrine with unlawful intent was sufficient in itself to establish a clear and present danger. "The instructions of the trial Court clearly show that, if the jury convicted under the rules of law there laid down, they would have necessarily found a clear and present danger existed" (id., p. 30).

This Court has held that the "danger" test is ultimately a question of law for the Court; the issue of intent is a question of fact for the jury (249 U.S. 47, 51-2). Justices Holmes and Brandeis in their dissents stated that these two elements, one subjective and the other objective, are constitutionally distinct. *Pierce v. United States*, 252 U.S. 239, 271. This distinction was reemphasized by this Court in *Hartzel v. United States*, 322 U.S. 680.

In *Dennis*, Judge Medina instructed the jury that only if it returned a verdict of guilt on conspiracy, intent and incitement, could he legally support his ruling of "danger". 9 F.R.D. 367, 391-2. In the Court of Appeals in New York, the "purpose of the utterer" was held distinct from the question of whether the nature of the utterances and the circumstances under which the utterances were made constituted a "probable danger". 183 F. 2d 201, 212. In this Court, "intent" was held to be an essential element of the crime (341 U.S. 494, 499), but this Court said that despite the findings of the jury on this issue, ". . . the Court *must* examine judicially the appli-

cation of the statute to the *particular situation*, to ascertain if the Constitution prohibits the conviction'' (id. p. 514) (emphasis added).

Clearly, in the light of the aforesaid, the trial judge was in fundamental error when it equated unlawful mental state with ''clear and present danger'', and refused to make any other ruling thereon.

4. The error in the equation of ''intent'' with ''danger'' led the trial judge to exclude any consideration of the power of the petitioners to bring about an attempt to forcibly overthrow the Government or of the nature of their activities. In *Dennis* Judge Hand stressed that the defendants were found to be the ''controlling spirits'' of the Party (183 F. 2d 201, 212). This Court, in determining whether ''the trial judge's treatment of the issue was correct'' (341 U.S. 494, 511) observed that defendants ''by virtue of their conrtol over the political apparatus of the Communist Political Association—were able to transform that organization into the Communist Party'' (id., p. 498) and that defendants in *Dennis* had been responsible for ''the formation'' of the conspiracy and were ''the leaders'' who the evidence showed were empowered to make the ''call'' when defendants ''felt that the time had come for action'' (id., pp. 510-11). It was upon such findings, ''coupled with the inflammable nature of world conditions'' (p. 511), that this Court held ''we are in accord with the Court below, which affirmed the trial Court's finding that the requisite danger existed'' (p. 510). This Court did not hold in *Dennis* that every officer and member of the Party in the United States possesses the ''power to bring about the evil''.

There was no evidence in this case that these petitioners in California possessed any power to cause any attempted forcible overthrow of the Government nor does the record present any evidence that the nature of their activities indicated any such purpose.

The Court of Appeals opinion, in its discussion of the issue, states that we "attempt no comparison of the respective records" in *Dennis* and the case herein (Appendix A, p. 6). It states that "world conditions" have not changed (id.), that the "general type of proof" was the same (id.); that the jury was not required to find whether these petitioners "as a whole" or individually had the power to "bring about the destruction of the government" (id., p. 31). "—if the trial court had thought these actions and utterances were merely vaporings of ineffective folk, upon motions for acquittal, a verdict of acquittal could have been directed" (id., p. 31). The "power to bring about the evil", according to the Court of Appeals, meant in *Dennis* only "the setting" in which the defendants there acted so as to allow the Court to conclude "that the teachings might have resulted in an attempt at overthrow" (id., p. 5).

In the first place, it is not only the setting or world conditions which determine whether utterances constitute a clear danger. The "setting" must be coupled with evidence that the utterer had the ability to bring about the substantive evil which Congress had a right to prevent. In the second place, the trial Court neither considered nor submitted to the jury the question of "vaporings of ineffective folk". Even a "timid man", the trial judge said, who advocated the proscribed doctrine "on a re-

corder" in a "very mild" tone of voice, with unlawful intent, constituted a "clear and present danger" (R. 12442-3). Thus, the constitutional rights of petitioners were determined without considering essential evidence necessary in the determination of "clear and present danger". Cf., *Lauf v. E. G. Shiner & Co.*, 303 U.S. 323, 329-30.

In this case, the determination of the issues of the petitioners' "power to bring about the evil" and the "nature of their activities" depended upon an examination and evaluation of the evidence in the record, which the trial judge, with the approval of the Court of Appeals, refused to make. Even if the ruling of the Court of Appeals had been otherwise; it would have been impossible for the appellate court to evaluate the evidence including the credibility of the witness, as to each of the petitioners, in a record of over 14,000 pages. This was a function for the trial judge, and this function the trial judge refused to perform.

The rulings of the courts below on the issue herein are in conflict with the decision of this Court in *Dennis*. In *Dennis*, this Court held that the question of "clear and present danger" was for the trial judge, and not for the jury, as the defendants contended. The rulings of the courts below have taken the matter one step further and actually removed the issue from Smith Act prosecutions.

II.

THE INTERPRETATION BY THE COURTS BELOW OF THE WORD "ORGANIZE" AS CONTAINED IN THE SMITH ACT CONSTITUTES AN ERRONEOUS AND UNCONSTITUTIONAL CONSTRUCTION OF THE STATUTE AND PRESENTS A NEW AND IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

1. The issue is whether the word "organize" as contained in the Smith Act includes "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, group or other organization" (App. Item 2(g), pp. 36-8). As a general rule of statutory construction, words of a statute will be interpreted in their ordinary acceptation and significance and are to be given their natural, received, popular, approved and recognized meaning. *Rosenman v. United States,* 323 U.S. 658, 661. Ordinarily, the word "organize" means bringing an organization into being and endowing it with organs with which to function. Webster, *New International Dictionary* (2d ed.); Black's *Law Dictionary* (3rd ed., 1944). To organize is a very different thing from extending the limits of the organization or adding to or increasing its size. It has been so held in an unbroken line of decisions to which there does not appear to be any contrary legal precedent. *People v. Thurman,* 62 Cal. App. 147, 216 P. 394 (1923); *People v. Thornton,* 63 Cal. App. 724, 219 P. 1020 (1923); *People v. Ware,* 67 Cal. App. 81, 226 P. 956 (1924); *Warren v. Barber Asphalt Pav. Co.,* 115 Mo. 572, 22 S.W. 490, 491 (1893); *State ex rel. Childs v. School District,* 54 Minn. 213, 55 N.W. 1122 (1893); *Whitmire v. Cass,* 213 S.C. 230, 236, 49 S.E. 2d 1 (1948).

2. This Court has never had occasion to pass upon the issue here. The question did not arise in *Dennis* because the charge in the indictment there and the proof showed organization of the Party on July 26, 1945 and the indictment was returned on July 20, 1948, and no comparable instruction on "organize" was given by Judge Medina. *United States v. Foster,* 80 F. Supp. 479, 481 (D.C. 1948). The question appears neither to have been raised nor considered on appeal in *Frankfeld,* 198 F. 2d 679 (C.A. 4, 1952). In *Flynn,* 216 F. 2d 354 (C.A. 2, 1954), the construction of the statute was directly contrary to the construction here (id., p. 358), and that portion of the indictment which charged a conspiracy to organize was held barred by the statute of limitations.

3. The history of the Smith Act and its phraseology indicate that the word "organize" is used in the ordinary sense. There was no discussion in Congress during the pendency of the measure as to the meaning of the term. Apparently it was assumed that the meaning of the word "organize" was obvious and settled. When Congress used a term in any special sense in the Smith Act, a special definition was inserted in the Act. See the definition of "Government of the United States", 54 Stat. 670, Title I, Section 2(b).

In *Dennis,* Justice Jackson noted that the Smith Act "followed closely the terminology" of the "criminal syndicalism statutes" enacted during the first World War. 341 U.S. 494, 562, note 2. It appears plain that Congress used these state statutes as one of the models for the Smith Act. The language of the California Criminal Syndicalism Act and the Smith Act are strikingly identi-

cal. Cf., Deering's General Laws, Act 8428, Section 2(4) and 18 U.S.C. Section 2385, par. 3. There appears to be no authority contrary to the three California decisions interpreting the word "organize" as used in this type of statute. *People v. Thornton*, supra; *People v. Thurman*, supra; *People v. Ware*, supra. Those decisions held that a society organized as the "I.W.W." to advocate and teach the proscribed doctrine was completely "organized" and in existence at and prior to the return of the indictment, and that neither the circulation nor distribution of the literature of the I.W.W. nor recruitment of members constituted "organizing or assisting in organizing" under the law. Ordinarily, it will be presumed that a legislature which follows the wording of a statute from another legislative jurisdiction accepts the previous judicial interpretations of the language. Such a presumption of legislative intention is especially strong where the similarity in language is marked, where the character of the decisions in the jurisdiction from which the language was adopted is well established, and there is no evidence to indicate a contrary intention. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 304-8; *James v. Appel*, 192 U.S. 129, 135; *Joines v. Patterson*, 274 U.S. 544, 549.

4. The Smith Act is a criminal statute and must be strictly construed. Penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. *United States v. Resnick*, 299 U.S. 207, 209; *Fasulo v. United States*, 272 U.S. 620, 629. The construction of the Act by the courts below was neither "strict" nor "fair" nor "clear". The view of the Court

of Appeals that the organization of the Party, like that of an army, will not be completed until such time as it has reached a membership which is as large as the Party desires and when the Party will accept only replacements, not additions, to its ranks (Appendix A, pp. 17, 18) confuses the size of an organization with the question of when the organization comes into being endowed to function as an organization. An army is organized when it comes into being and begins to function as an army and the Communist Party is organized when it comes into being and is endowed to function as the Party, although in the case of the army it may only come into being when it has recruited its full complement. In the case of any society, group or assembly of persons, they at least are in being and endowed with organs to function, no matter what the program or policies of the association may be, when at a formal convention a constitution is adopted and officers and committees elected. The indictment here was returned December 21, 1951. Under the construction of the statute by the courts below, a jury could return a verdict of guilt under either the substantive "organizing" charge or the conspiracy charge if the evidence showed only that a decade or more after the formation of the Party with its alleged proscribed doctrine an accused recruited a member into the Party, or suggested that one club be merged with another.

5. Since the trial judge told the jury that the word "organize" includes certain activities but did not purport to give an all inclusive or limited definition, the jury was left free to speculate that almost any innocuous activity was "helping to organize, or to organize" the

proscribed society. Such an extended construction of the word "organize" would encompass "advocating and teaching" (18 U.S.C. Section 2385, par. 1): "printing and publishing" (id., par. 2); and "membership and affiliation" (id., par. 3), in complete disregard of the plain Congressional purpose to create separate offenses.

The construction adopted by the courts below renders the statute unconstitutional, first because, as construed, the statute provides no ascertainable standards of guilt (*Musser v. Utah*, 333 U.S. 95, 97; *United States v. Cardiff*, 344 U.S. 174, 176), and second, because the statute thus permits the penalizing of activities protected by the First Amendment (*Thornhill v. Alabama*, 310 U.S. 88).

A statute which punishes the organization of a society with proscribed doctrines itself raises serious questions affecting freedom of speech and assembly as this Court noted in *Dennis*. To make any lawful activity of members of the organization thereafter a criminal attribute of "organize" is to permit the statute to sweep within its ambit ideas and activities protected from governmental infringement by the Constitution. The most lawful speech of a Party member which resulted in the recruitment of a single person could result in criminal prosecution under the "organizing" statute. Cf., *Wieman v. Updegraff*, 344 U.S. 183.

6. If petitioners' view be accepted, concedely so much of the indictment as charged a conspiracy to organize was barred by the three-year statute of limitations. Judge Dimock in *Flynn* so instructed the jury: "The Communist Party was organized back in 1945 . . . Thus, even if you

should find beyond a reasonable doubt that a defendant, who had not conspired to teach, had conspired to organize a group to teach, you could not find him guilty because the act of organization of the Communist Party was, as we say prior to the period of the Statute of Limitations." *United States v. Flynn*, unreported (S.D.N.Y. 1953; C 137-7). The question of the guilt of an accused cannot be submitted to the jury when the cause of action is barred by the Statute of Limitations. *United States v. Irvine*, 98 U.S. 450. "Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one." *Fiswick v. United States*, 329 U.S. 211, 216. The conviction of petitioners, under the general verdict of the jury, may have rested upon that portion of the charge barred by the statute of limitations. Moreover, even if the charge of conspiracy to organize were not barred by the statute of limitations, the jury was permitted to return a verdict of guilty on the theory that recruiting or other activity in the Party was proof of participation in a conspiracy to organize as charged. The judgments of conviction must therefore be set aside if the construction of the statute by the courts below was erroneous. *Stromberg v. California*, 283 U.S. 359, 369-70; *Williams v. North Carolina*, 317 U.S. 287, 291.

III.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT EACH OF THE PETITIONERS HERE KNOWINGLY AND WILFULLY JOINED THE CONSPIRACY ALLEGED IN THE INDICTMENT WITH THE SPECIFIC INTENT TO OVERTHROW THE GOVERNMENT OF THE UNITED STATES BY FORCE AND VIOLENCE AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT. THE COURTS BELOW PERMITTED THE JURY TO RETURN VERDICTS OF GUILT UPON STANDARDS OF PROOF VIOLATIVE OF THE DUE PROCESS PROVISIONS OF THE CONSTITUTION AND IN DEROGATION OF THE FREEDOMS PROTECTED BY THE FIRST AMENDMENT.

1. This Court has "never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict". *Mortenson v United States,* 322 U.S. 369, 374. "Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States,* 322 U.S. 665, 671. See also, *Klapprott v. United States,* 335 U.S. 601, 612: *Hartzel v. United States,* 322 U.S. 680; *Schneiderman v. United States,* 320 U.S. 118. See, *Offutt v. United States,* 99 L. ed. Adv. 7, 10. This Court has stated that in cases affecting the fundamental liberties of an accused the proof must be "clear, unequivocal and convincing"; there must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" (*Baumgartner v. United States, supra,* p. 670, 671: see also, *Hartzel v. United States,* supra, p. 687).

This Court stated in the proceedings on bail in the case herein: "Even on a conspiracy charge defendants

do not lose their separateness or identity." *Stack v. Boyle,* 342 U.S. 1, 9. Guilt remains individual and personal, even as respects conspiracies. "It is not a matter of mass application." *Kotteakos v. United States,* 328 U. S. 750, 772. Especially is this true in a case where restrictions on First Amendment rights are largely dependent upon substantial proof of an individual unlawful state of mind.

Unless membership and officership in the Communist Party alone establish participation in the illegal conspiracy charged herein and the requisite specific intent, there is absolutely no basis for the conviction of these petitioners. A review of the evidence relating specifically to each of the petitioners will demonstrate the complete absence of any substantial evidence to support the judgments of conviction herein. Not only is there a failure to establish guilt by a "solidity of proof" or by "clear, convincing and unequivocal evidence", but in most instances there is not even a shred of evidence to support the essential ingredients of the offense charged against these petitioners. The following is a statement of the evidence as to each petitioner. We do not repeat the evidence against petitioner Steinberg set forth in the state of the case, except to assert that if participation in a lawful public meeting held under the auspices of the Communist Party is to be held sufficient to justify a conviction under 18 U.S.C. Sections 371 and 2385, as the Courts below held in effect, such wide breach in the Constitution should at least demand the scrutiny of this Court.

Dorothy Healey Connelly.

Petitioner Dorothy Healey Connelly is shown to have been connected with the Young Communist League as far back as 1933 (A 243).[10] The earliest evidence of her Party membership relates to 1945. The record shows that she held the following positions in the party: from 1945 until 1948 Organizational Secretary for Los Angeles County (Exs. 321, 298, 407, 415, 450-1, 640, 641, 643-5; A 124-5, 289-90, 305-6, 374-5); and in 1949 and 1951 Chairman for Los Angeles County (Ex. 642, A 291-2, 451).

She attended the National Convention in 1945 and upon her return spoke at the California State Convention where she advocated a "militant" future for the Party and re-education of all Marxists (R 44, 130-1).

The record is devoid of any evidence relating petitioner to the concept of forceful overthrow of the government or to Marxism-Leninism as embracing this concept.

It is impossible to rationally infer that an accused wilfully joined a conspiracy to advocate and teach the forcible overthrow of the Government with specific intent to forcibly overthrow the Government as speedily as circumstances permit because the accused advocated the "re-education of all Marxists" or a "militant" Party. It should be noted that the record is barren of any overt acts on the part of this petitioner to support any inference of wrongdoing or criminal intent.

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[10]The letter "A" refers to Appellee's Appendix in the Court of Appeals.

Rose Chernin Kusnitz.

This petitioner held the following offices in the Party: in 1943 Section Organizer, Bronx Section, Bronx, New York (A 317); during 1949 Section Organizer West Jefferson Section, Los Angeles County and Organizational Secretary of the Midtown Division, Los Angeles County (A 356).

In 1946 she attended a public Party meeting at the Embassy Auditorium at which petitioner Schneiderman made a speech in which he reportedly "urged that Marxist training be immediately adopted" and said "that free elections in this country can only serve the purposes of the fascists" (A 133-5).

There is no evidence at all connecting this petitioner in any fashion with advocacy of the violent overthrow of our government or the reading, use or interpretation of Marxist-Leninist works. Indeed, the record is so barren of any proof against this petitioner that even the "scintilla" rule of evidence would appear to be violated. Even the aforesaid statement which she allegedly heard in a public meeting, not shown to have been accepted or adopted by the petitioner, appears to be garbled in the light of the uncontradicted record showing support and use by the Communist Party and these petitioners of the democratic machinery of our government, including the electoral process (Exs. 546, 534, EK 7, App. Item 20 pp. 127-30; Exs. 516, 517, 199; App. Item 21 pp. 130-1; Exs. 579, 544, 542, 631-5 incl. 519, 578, 530; 555, 557, 538; App. Item 22, pp. 131-3).

Albert Jason Lima.

Petitioner Lima was a Party member in 1940 (Exs. 527-8, A 452). He held the following positions in the Party: In 1945 Field Organizer working out of the San Francisco office (A 12); in 1945 and 1947 member of the National Committee (Ex 650, Ex EA 598); in 1947 Assistant State Organizational Secretary and Secretary of the California organization (Exs. EA 561, 569; A 447); in 1948 "Field Organizer" (Ex. 315); and in 1950 Chairman of the East Bay Region, consisting of Contra Costa and Alameda Counties, California (A 109-11).

In 1947 he attended a meeting at which petitioner Schneiderman spoke, which meeting was attended by petitioner Yates.

There is no evidence relating this petitioner to Marxist-Leninist books. And there is none of any advocacy by him or agreement to advocate violent revolution.

Only a process of sheer guesswork and conjecture could support a finding of guilt on the part of this petitioner.

Loretta Starvus Stack.

Petitioner Stack was shown to be a member of the Party as far back as 1932. She has acted in the following official Party capacities: In 1945 California delegate to the National Convention (A 72-3); in 1945 member of the California State Committee (Ex. 398; A 124-5, 130); 1945 to 1949 California State Secretary or Organizational Secretary (Exs. 533, 562, 564, 566, 569, 570, 577, 582, A 446-52); in 1950 member of the California State Committee (A 418).

According to a prosecution witness at the 1945 State Convention "Loretta Starvus made a fiery speech accepting her election to the state board by stating that American workers will be the grave diggers of the capitalistic government, and she urged Marxist-Leninist rules, reinstitute them all over" (A 130). At a Party Convention in Los Angeles in 1946 she said that "we, speaking of the Communist Party, are the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form set up" (A 29-30). The same year, at a county conference of the Party, she spoke of poor housing conditions as an example of what must be endured under capitalism, and said that this should "spur us into working for socialism in our time in the United States" (A 306). In none of these speeches was force or violence mentioned as the means to be used to achieve the desired objectives.

In 1948 she made a report to the State Convention of the Party in which she discussed the ability of the party to participate effectively in "building a people's coalition against war and fascism". In this connection she spoke of the reconstitution of the Party as "the vanguard of the working class", and of the "class struggle of the proletariat". To rebuild the Party, she said the "members who had joined during the revisionist period had to be won over to the Marxist principles of Party membership"; in order to achieve the Party's political objectives labor must become "the backbone of the new party and of the coalition" against war and fascism, requiring consistent emphasis upon building the Party among industrial workers (Ex. 186; A 580-1).

Also in 1948, at a Party meeting she "made reference to the historic role that the women played in bringing about the Russian revolution" and she said "that women of today . . . must take the same historic role . . . and the exoneration of the women would only be brought about through this revolution, the overthrowing of the present economic system, not in part but in its entirety" (A 117-19).

The only evidence in any way tying this petitioner into advocacy of force and violence goes back to 1934, sixteen years before the date of the indictment here. In 1934, according to the witness Leonard Patterson, she told him that she had been taught street fighting and the use of bayonets at the International Lenin School in Moscow; that it was the duty of students at the school to prepare the Party for "illegal work", but to attempt to "stay legal" as long as possible; that if the Party was driven underground it should remain "intact" and "function right along"; and that it was the students' duty "to work to overthrow their own governments and to set up the dictatorship of the proletariat as a guarantee that the Government that was overthrown would not regain its power" (A 213-20). The witness Patterson first became available to government agencies in 1947. He did not discuss the alleged conversation, of which he had kept no record, with anyone until January, 1952 (R. 5644, 5759, 5763).

There is nothing in the record showing that this petitioner supported the use of force and violence by advocacy, agreement to advocate or otherwise during the entire sixteen year period following this alleged conversation. Not

even the appearance of a case could have been made against this petitioner without the alleged conversation of 1934, seventeen years before the return of the indictment herein. The only other isolated statements petitioner allegedly made orally in this twenty year period (three in number) were rhetorical matters of prediction and prophecy devoid of advocacy of force or violence.

With respect to the 1934 conversation, it should be noted that the story was filtered through the self-deluding memory of a hostile, professional witness who had waited almost two decades to tell his tale (R. 5623-6, 5633-40, 4652, 5656, 5665, 5677-78, 5686-90). The witness' identification of petitioner was dubious (R. 5355-57, 5766-70). He was an active and professional informer admittedly earning more money than he had ever earned before, scurrying from one case to another identifying persons he hadn't seen for periods ranging back to fifteen years or more (R 5623-26). A recent editorial in the public press states: "It is reasonable to suppose that the professional, paid informers, such as those on the rolls of the Justice Department, who can be said to make their living at this game, feel the necessity of continuing to 'produce' if they are not to give up their lucrative occupation." New York Times, July 8, 1954. That evidence of a so-called uncorroborated and private oral conversation, allegedly occurring decades before the trial and emanating from a paid informer, is generally distrusted and considered palpably insufficient to support a conviction is the judgment of the law. Wigmore, *Evidence* (3d ed.), Vol. IV. Section 1056; Vol. VII, Section 2094. The principle finds its support in past history

(Chafee, *Freedom of Speech* (1920), pp. 357, 490; May, *Constitutional History of England*, II pp. 275-78), as well as in contemporaneous events. *United States v. Schneiderman*, 320 U.S. 118, 128; *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955), opinion of Dimock, J. granting motion for new trial in part after the notorious Matusow revelations.[11]

Frank Efroim Spector.

In 1939 petitioner Spector was referred to in a Party publication as a "pioneer leader of the Communist Party in Los Angeles" (Ex. 611). He held the following offices in the Party: From 1936 until 1940 organizer, secretary or chairman for San Francisco and member of the County Committee (A 5-6, 12); 1950 Los Anegels County Southern Division Organizer (A 292-4).

In 1946 he conducted classes in Hollywood and assigned reading material from several Marxist-Leninist works (R 663-5); in 1947 petitioner criticized a suspected spy who had been Educational Director of a club for his having read only several Marxist-Leninist writings and told him that a person in a position of such responsibility ought to be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members (A 310-12); in 1949 it was announced that he would

[11] Although the issue of the credibility of paid government informers was crucial in the trial herein, the trial Court refused to specifically instruct the jury that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution (App. Item 2(q), pp. 69, 80). See, *District of Columbia v. Clawans*, 300 U.S. 617, 630; *Fletcher v. United States*, 158 F. 2d 321, 322 (C.A.D.C., 1946).

act as instructor on the topic of "The State" at a Party County Section Leadership Training School (A 297).

There is evidence neither that petitioner ever construed Marxism-Leninism as calling for the violent overthrow of our government nor that he has ever advocated or been connected in any way with advocacy of violent revolution.

The fact that petitioner suggested or recommended the reading of Marxist literature could not justify an inference that petitioner intended to join the conspiracy alleged in the indictment with the specific objective of forcibly overthrowing the Government as speedily as circumstances permit. The Marxist writings introduced into evidence by the prosecution were in many instances identical with, and in the others in substance the same as, those introduced in *Schneiderman v. United States*, 320 U.S. 118.

Many of the prosecution as well as the defense exhibits contained language inconsistent with the prosecution's theory of guilt from adherence to Marxism-Leninism. For example, the Constitution of the Party specifically opposes advocacy of force and calls for the establishment of Socialism "by the free choice of the majority of the American people" (Ex. 21; App. Item 14, pp. 114-16).[12] Many official utterances of the Communist Party advocated the use of democratic channels to educate the people as to the necessity for Socialism with the per-

[12]Unlike the *Dennis* record, there was no testimony here of an understanding by the petitioners that this language or any other Party publications did not mean what it said. 183 F.2d 201, 229, 232.

spective of winning the great majority to support and achieve that aim (Ex. 55; App. Item 15, pp. 116-117; Exs. BC 83, 150, EU; App. Item 16, pp. 117-118; Exs. 626, 201). Advocacy of force and violence was explicitly denied (R. 1161, Ex. FG 5121-25; Ex. KI, R. 10623).

Much of the evidence relied upon by the prosecution consisted of third party declarations outside of the presence and without the knowledge of any petitioner. In connection therewith it was shown that differing views were constantly expressed within the Party and that arguments concerning the meaning and interpretation of Marxism-Leninism were frequent (App. Item 39, pp. 175-176; App. Item 40, pp. 176-7), including disagreements with the views of the Party leaders and of the National Chairman of the Party (App. Item 40, pp. 176-7; App. Item 40, pp. 177-80).

In the light of the aforesaid uncontradicted record, it can hardly be claimed that a recommendation to read Marxist-Leninist literature was equivalent to the advocacy of the forcible overthrow of the Government of the United States. Yet this is precisely what the jury was permitted to infer.

Oleta O'Connor Yates.

Petitioner Yates joined the Party in 1933 (R. 10250). She held the following positions in the Party: In 1936 Organizer of San Francisco County, member of the District Committee of District 13 and a delegate to the National Convention (A. 6-8; Exs. 522-5, 584, 631-4); until 1944 various positions in the San Francisco County organization and in 1944 the County Chairman (A. 7-8,

378; Exs. 563, 565); from 1950 until the time of trial, California State Organizational Secretary with the duties of helping organize recruiting to build the Party, of organizing mass campaigns and of checking on dues payments (A. 393-4).

She used certain Marxist-Leninist works in lecturing at a Party school in 1936 and 1937 (A. 8-9, 248-9); she taught a Marxist class in 1945 (A 369); in 1946 she contributed an article entitled "The Struggle Against Deviations and Factionalism in San Francisco" to the Party publication "Political Affairs" (Ex. 639, A 157-9, 597); and in 1949 with assistance of petitioner Schneiderman she prepared a "Study Outline" for a Marxist Institute (Ex. 163, A 397). Despite the fact that prosecution witnesses were present at the classes on Marxism taught by petitioner Yates, there is not a word of testimony in the entire record indicating that she ever construed Marxism-Leninism as calling for the violent overthrow of the government of the United States. In her 1946 Political Affairs Article she supported a program for peace, coalition with progressive forces and participation in election campaigns; she opposed a policy calling for strikes regardless of whether they can be won (App. 334-43, Item 83). The outline prepared in 1949 stated:

> "3. Attitude of American Communist Party on force and violence defined in Constitution—advocates of force, violence or terrorism barred from membership."

Petitioner testified at length concerning her own adherence to and understanding of Marxism-Leninism.

She became interested in Marxism-Leninism in the early '30's during the depression. She was seeking and found in Marxism-Leninism what appeared to her to be explanations for the economic problems of the times (App. Item 84, p. 343).

As a result of her interest in Marxism-Leninism she joined the Socialist Party (R. 10198-9). She became dissatisfied with the Socialist Party because its program did not call for any activity around the immediate issues confronting the American people (App. Item 85, p. 844). During this period she began to learn about the Communist Party and became interested in it because of its program calling for such activities under our existing Government on the day to day problems of the people, including such matters as unemployment, housing, relief, etc. (App. Item 86, p. 345).

She left the Socialist Party and joined the Communist Party because of these views and because she believed that the Communist Party was educating the people to understand "the need ultimately of moving toward a socialist society" (App. Item 87, p. 347). Her state of mind from the time of joining the Communist Party up to and including the time of her testifying was that she was acting lawfully in exercising her "responsibility" to bring forward those things that "I believe would serve the cause of the people and the country and that the people would determine for themselves what they accepted" (App. Item 88, pp. 347-8).

It is her understanding that the general principles set forth in Marxist-Leninist writings must be *considered in the light of the historical conditions* under and with

respect to which they were written and must be *"applied in the light of different circumstances today"* (App. Item 89, pp. 348-9).

It is her understanding that the principles of Marxism-Leninism correctly applied and as applied by the Communist Party after the threat of fascism appeared on the world's scene required opposition to fascism and called for a people's movement to prevent it and to defend democracy; that the defense of democracy and opposition to fascism would ultimately open up new ways for the majority when they wanted it to achieve socialism peacefully (App. Item 54, pp. 223-4); that the greater the democracy the greater the possibilities of bringing about social changes in a peaceful manner; that if our democracy is continued and expanded there is no need for fearing strife or violence in the effecting of social change. In her own life she has done everything possible to strengthen the democratic processes (App. Item 90, p. 349).

According to her understanding of the correct application of the principles of Marxism-Leninism and of the Communist Party, socialism is not and has never been an immediate issue in the United States. It can become an immediate issue only when the majority of the people want it (App. Item 91, p. 350); the Communist Party must win the adherence of the majority of the people and only through their free will can or should socialism be established (App. Item 92, p. 351). She can conceive of no situation in which she should advocate the forceful overthrow of the present Government of the United States (App. Item 94, p. 358).

The record reveals, during petitioner's entire seventeen years of Party membership, not a single utterance written or spoken of advocacy or indicating adherence to the doctrine of violence. It does indicate her attendance at three meetings at which others are reported to have made statements which respondents contended constituted advocacy of force and violence.

In 1945 during the United Nations Conference, she attended a reception for Mother Bloor, then 83 years of age. The reception was held on printed invitation at the home of a non-Communist and present were Communists and non-Communists, including casual drop-ins. Photographs were taken of all present at the reception. At this meeting, according to the witness Daisy Van Doren[13], Mother Bloor said that she was happy to be in San Francisco "on the eve of our great rebellion", "that we are prepared to the point that we have arms awaiting for us", that "it is going to be a wonderful revolution", that "I am 83 years old and I will live to see this bloody battle through", and "there will be blood flowing in the streets" (A 369-72). At the same time, according to this witness Mother Bloor called on the assemblage to be good Red Bolsheviks and to be "slick, sly and smooth ... Don't be rough. You won't win people over that way". According to the same witness, Mother Bloor also praised the wonderful gathering of peace-loving nations to the United Nations as a "basis for a lasting peace", she mourned Roosevelt's death and stated that while "we don't know about Truman, that we are going to give

[13]She was so discredited that the prosecution did not even refer to her hair raising testimony in closing argument.

him a trial" (R. 8002-4). Petitioner Yates testified that the reception took place but that there was no talk of revolution or violence (R. 10841-9).

In 1946 she attended a club meeting at which some "leftist" Party members were on trial. Petitioner Fox, in answering claims of the accused that the Party was not "revolutionary" said that "it was a revolutionary party, that he wanted to see the overthrow of this lousy system just as much as any one else present, but there was a time and place for militant action and it had not arrived yet" (A 148-50).[14]

In 1947 she attended a meeting, at which petitioner Schneiderman said that the goal of the Party was the establishment of socialism, that the masters of finance capital would never give in without a fight and that socialism would only be brought about by a violent revolution (A 146-7). The witness who testified to this incident stated that what he had been taught in the Party on this subject was that violence would take place because when the majority of the American people would exercise their free choice to establish socialism, the minority would not permit the majority to effect such a change peacefully (R. 4902-3, 4912-13).

With respect to none of the last three mentioned meetings is there any evidence that petitioner Yates said or did anything at all.

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[14]The respondent has contended that the word revolution necessarily connotes force and violence, despite the uncontradicted evidence (Ex. 626, R. 1785) and the trial Court's instructions (Inst. 14-J, App. Item 2(m), p. 56) to the contrary.

Not only is the case against petitioner Yates devoid of any proof of an unlawful intent as alleged in the indictment, but the affirmative testimony of petitioner's lawful state of mind is unrefuted on this record. The prosecution relied on three unrelated meetings (during a period of almost twenty years) which petitioner allegedly attended, but where she said nothing. At none of these meetings were the equivocal statements of the speakers properly imputable to petitioner or capable of establishing petitioner's specific intent as alleged in the indictment.

Petitioner's understanding of Marxism-Leninism was entirely lawful, and even supported by the prosecution's own evidence. The exhibits relied on by the prosecution, written with respect to time, places and conditions far different from those prevailing with respect to the activities of petitioner, stated that the conclusions there contained could not be mechanically applied to different places and circumstances (App. Item 48, pp. 206-7; Ex. 28; App. Item 49, pp. 207-8; Ex. 147; Ex. 39, R. 2618).

Repeatedly the writings say that "every nation will effect its transition to Socialism not by a mapped-out route, not exactly as in the Soviet Union but by its own road, dependent on its historical, national social and cultural circumstances" (Ex. B B R. 2667-68).

Prosecution witnesses conceded that when they were members of the Communist Party they understood that methods used in Russia were not applicable to the United States, they believed in the establishment of socialism in this country by the free will of the majority and they had been taught that violence was not part of the Party Program or Marxism-Leninism as applied to a democratic

government like that of the United States (App. Item 17, pp. 118-122; App. Item 18, pp. 123-125). All of the aforesaid were petitioner's beliefs, unrefuted on this record, and the charge against this petitioner was for these reasons not sustained.

Carl Rude Lambert

Petitioner Lambert was a member of the Party and responsible for security in 1935 (A 249-50). He has held the following positions in the Party: in 1936 member of the Party Control Commission (A 12); in 1939 and 1942 Financial Secretary of District 13 (Exs. 572-574; A 446); in 1944 Administrative Secretary for San Francisco (Ex. 563; A 448); in 1946 head of the Security Committee in California (A 150-3, 235); in 1949 State Financial Secretary and Chairman of the State Security Board (Exs. 564, 582; A 447-50, 327).

In 1945 he attended the "Mother Bloor" meeting discussed supra p. 61) (A 369-72). In 1946 he was present at the club meeting at which petitioner Fox spoke, discussed supra (A. 148-50). In 1947 he was present at the meeting discussed supra at which petitioner Schneiderman is reported to have said that the change to socialism would involve violence because the "masters of finance capital" would not permit the majority to achieve such a change peacefully (A 145-7).

In 1948 he attended a functionaries meeting at which petitioner Dobbs referred to a chapter of the History of the Communist Party of the Soviet Union (Ex. 28) dealing with the Russian newspaper Pravda and said that the People's World had a similar role to that of Pravda and

had to be maintained for the purpose of disseminating information and instruction (A 186-92). In 1950 he was present at a club meeting in Chico, California at which one Sutherland, an FBI plant in the Party, was expelled on charges of chauvinism, an attempt to cheat a Negro worker out of his property and carrying a gun while distributing Party leaflets. Sutherland testified that petitioner said that Sutherland's expulsion was recommended by the State Board because they were purging the Party for "emergency or revolution"; that one Alexander said that the European crisis may decide when a revolution can be expected; that petitioner then said that in the light of possible world developments "anything can be expected"; that Sutherland then said: "Are you really planning revolution by bullets instead of ballots" and Alexander replied to Sutherland who was being expelled: "Just what the hell do you think we are purging the party for?" (A 327-9, R. 7664-8).

There is no evidence that petitioner interpreted Marxist-Leninist writings as calling for the forceful overthrow of the United States government and there is none that in his entire Party membership he ever advocated violent revolution.

Indeed the record is virtually barren of anything the petitioner himself said or did while a member or officer of the Party. The concern of petitioner with spies and provocateurs in the Party was not proven to be for any unlawful purpose, and in fact the undisputed record demonstrates that the concern was to protect the Party membership from illegal attacks, both from private as well as official lawlessness (R. 5896-5930, 5953-65). The

attempt to impute to petitioner the conversation between an informer and a third person was fruitless. There was no evidence on the record that petitioner by his overt conduct, directly or indirectly, adopted the view of the third party, even if such view was ever expressed. The inherent incredibility of the story concerning "revolution by bullets instead of ballots" was manifest. The government informer who testified to the conversation with the third party was at the very time being expelled by the Party for carrying a gun. Without this incident, the case against petitioner was patently empty.

Ernest Otto Fox

The evidence shows that petitioner Fox has held the following offices in the Party: in 1935 Organizer in Seattle, Washington (A 10); 1947 and 1948 Chairman of a Party Club (A 283); in 1948 and 1949 Chairman of the Haskell Section of the Party in San Francisco (A 288); in 1949 Organizer of the Waterfront Section in San Francisco (A 288); and in 1951 Maritime Section Organizer in San Francisco (Ex. 177; A 579).

In 1946 at a Party meeting at which "leftists" were on trial petitioner said that the Party "was a revolutionary party, that he wanted to see the overthrow of this lousy system just as much as anyone else present, but that there was a time and place for militant action and it had not arrived yet" (A 148-50).

In 1948 he maintained a complete set of the Little Lenin Library in his home (A 289). There is no evidence as to his reading, use or interpretation of these or any other Marxist-Leninist works.

The charge here was not the advocacy and teaching of the overthrow of the *capitalist system.* There was no discussion of the use of force and violence or unlawful methods to achieve the substitution of one economic system for another. The words "revolution" or "overthrow" do not mean the use of force and violence (see, App. Item 2m, p. 56); they connote the result of social changes; not the method of obtaining them. Clearly, a single incident such as the one here involved emanating from the mouth of a hostile and biased witness (R. 4717-21) was not "clear, convincing and unequivocal" proof of every essential ingredient of the offense charged against this petitioner.

Ben Dobbs

This petitioner was a member of the Young Communist League from 1932 to 1945 and its San Francisco Director in 1935 (A 11, 243). The record indicates that he has held the following offices in the Party: in 1936 member of the California State Committee (Ex. 549; A 458); from 1946 to 1949 Los Angeles County Labor Chairman, Labor Director, Trade Union Director or Labor Secretary (A 137; Ex. 407; A 289-90; Ex. FO. p. 3; Exs. 737, 159B; A 208-11); in 1950 Los Angeles County Organizational Secretary (A 292-4); and in 1951 an officer (title not given) in Los Angeles County (Ex. 642, A 451).

In 1948 at a Party Press School, petitioner gave a lecture, with assigned reading of several pages of History of the Communist Party of the Soviet Union (Ex. 28), in which he "described the role that Pravda had played in the assisting of the Revolutionary movement in Russia" and of its continued circulation when it was out-

lawed; he urged that "we see to it that we had organizations set up to provide as Pravda had done for the distribution of literature from hand to hand, if necessary, or in any other method that we were able to do in the event that Communist publications themselves were no longer allowed in this country"; he stated that if the Party was not outlawed, it was necessary to build the press to get at least widespread "reading, if not acceptance, by those people to whom we are able to distribute it". He made no statement that the press and literature should be used to advocate the forceful overthrow of our government (A 193-6).

In 1948 at a functionaries meeting he again referred to the portion of the "History" (Ex. 28) dealing with Pravda, made a comparison of its role with that of the People's World[15] and said that it should be maintained for the purpose of disseminating information and instructions (A 186-92).

Petitioner was the main speaker at the Lenin Memorial meeting of January 21, 1949, which served primarily as a protest against the trial in New York of the national leaders of the Party, and which was charged as an overt act. The record is silent as to the contents of petitioner's speech (A 208-11).

As the above recital indicates, there is not the slightest evidence in the record that petitioner Dobbs ever advocated or taught, directly or indirectly, the forcible overthrow of the Government. The few statements he made while a member and officer of the Party were so obvi-

[15]Numerous copies of *The People's World* are in evidence. In none is there anything resembling advocacy of violent revolution.

ously the expression of lawful views, that it cannot be rationally inferred therefrom that petitioner intended to commit the offense charged in the indictment. Concern that the Party and its publications might be outlawed cannot be equated with advocacy and teaching of the forcible overthrow of the Government. A prosecution witness himself testified that the so-called "underground" was viewed by the Party as a means to "fight its way back into legality" in the event of outlawry (R 5901-28, Exs. FX, GC, GA; App. Item 76, pp. 290-3; R 1332, 4471).

Frank Carlson

The evidence indicates that petitioner Carlson became a member of the Party in 1932 or 1933 (R 7421; Ex. FF; R 4918; Ex. 730). In 1935 he was California State Director and in 1937 a member of the State Committee of the Young Communist League (A 11, 246). The record indicates that he held the following offices in the Party: in 1947 organizer and State Secretary in Wisconsin (Ex. 729, A 276, 280, 365); in 1949 Los Angeles County Organizer (A 84).

In 1936 petitioner led a study group which used Lenin's works, at which he said that something new had happened in the world, that "we must look to Lenin for the answers" and called for a program of putting an "American front to the Young Communist League" and winning young people for the fight against fascism (A 244-5).

In 1946 he taught classes in Marxism (A 358-65) and in 1949 he visited a session of a Marxist Institute (A 84). At no time is he reported to have construed Marxism-Leninism as advocating violent revolution in the United States.

Sometime after the end of World War II petitioner wrote, and the Party distributed, a pamphlet entitled "Let's Get Off the Dime". The pamphlet urged a strong defense of the living standards of the people, increased unemployment insurance, fair employment legislation and international collaboration for a peaceful world. Petitioner contended that by maintaining their trade unions strong, clean and democratic and by participating actively in the political life of their communities, the working people could most effectively protect their interests. As for socialism, appellant stated that was his goal and that of the Party (R 11967-69) but specifically declared that the goal would be realized only "when the decisive section of the American people line up with us" (Ex. MF R. 4916, A 938-69).

According to one witness, petitioner had a conversation with him in 1947 in which he referred to a situation in which Negroes resisted with arms an armed attempt at lynching; and when the witness purportedly asked petitioner how the Negro people got the guns, the reply was "Well, the Party has methods of doing so"; the petitioner then urged the witness to form an organization, the United Negro and Allied Veterans, stating that in the event of "a revolution in this country to overthrow this country by the Communist Party, that the Negro boys (sic) in the North will have to be militant enough to guide the Negro people in the South", and that Negro people should become more militant because capitalism is the cause of chauvinism; and he urged the witness to buy certain Marxist-Leninist books (R 6480-1). The witness' contemporaneous written report to the FBI,

Exh. 730, differed substantially from his testimony and quoted appellant in this reference as saying "Negroes in the South will have to be taught the communist way of living (program which is now being carried on by the Communist Party, the C.I.O. and the *American Federation of Labor*) before they can receive fire arms in the event of *revolutionary action by the fascists* in that part of the country". In explaining his report the witness said that he considered resistance to a Fascist revolution similar to overthrow of the Government of the United States (R 7446-9; emphasis supplied).

As the record indicates, in his daily activities as a member and officer of the Party, and in his writings, petitioner urged the use of peaceable and democratic methods for achieving both immediate reforms and future basic social changes. The only attempt to impute to petitioner the use of language of force and violence proved to be an expression by petitioner of resistance to "revolutionary action by the fascists", evidence which quite refutes the notion of an intention to forcibly overthrow the Government of the United States. The record in fact is indisputable that this petitioner by his overt daily conduct and writings believed only in peaceful methods of obtaining change and that his intent was entirely lawful.

The Communist Party, the record establishes, campaigned and conducted activities around such issues as discrimination, peace, social security, labor's rights, taxation, civil liberties, etc. (Ex. H.; App. Item 22, pp. 132-7; Ex. DX; App. Item 25, pp. 138-42; Ex. 359; App. Item 26, pp. 142-4; Ex. FM; R 5260; Ex. MN; R 11834, Ex. EA, R 4350; Ex. AQ, R 1885; App. Item 22, pp. 131-2).

The record as to this petitioner and others establishes no more than participation in activities of this character together with membership and the holding of office in that party.

3. While the Court of Appeals opinion employs general conclusions to support its view that the jury was justified in returning a verdict of guilt as to each of the petitioners (Appendix A, pp. 34-6), it must be noted that there is no attempt to support these conclusions by evidence from the record. "It is unnecessary to set out tabulations of the facts here" (id. p. 35, note 14). In actuality, the Court of Appeals states that many of the petitioners sought and obtained office as "organizers" in the Party (id. p. 34). It follows, states the Court, that "the jury might well have inferred from this participation a carrying into the field of action a phase of an illegal agreement", and the jury could have concluded that acceptance of such an office "evinced a participation in the unlawful agreement" (id. pp. 34-5). It is, therefore, from membership and officership in the Party that the courts below drew their catenate inferences, without any support in the evidence to justify the ultimate conclusions which led to the submission of the case to the jury.

However the "inference upon inference" rule may be abstractly criticized, it is a reflection of the underlying distrust of inferences which rest upon too many intervening inferences, and this Court has invoked the rationale of the rule in particular cases. *United States v. Ross*, 92 U.S. 281; *Manning v. Insurance Co.*, 100 U.S. 693, 698; *Looney v. Metropolitan R. R. Co.*, 200 U.S. 480, 488; *C. M.*

& St. P. Ry. Co. v. Coogan, 271 U.S. 472, 478; *Shepard v. United States*, 290 U.S. 96, 100. Here the evidence establishes no more than the connection of the petitioners with concededly lawful objectives and activities of the Party. There is not only an absence of speech or conduct by petitioners directly tending to prove the specific criminal intent, but there is no circumstantial evidence from which an inference of evil purpose can reasonably be drawn. Moreover, as has been indicated, there is strong circumstantial evidence from respondent's witnesses and exhibits logically pointing to the absence of such intent. Every link in the chain of inferences and presumed conclusions which the courts below permitted the jury to draw were the result only of arbitrary and prejudiced conjecture and surmisal. The barometer of guilt was made dependent in reality upon alleged long time membership and officership in the Party accompanied by lawful activities. The jury was permitted to guess that at some point each of the petitioners "must have come to know" that the Party, in basing itself upon the principles of Marxism-Leninism, actually was advocating the forcible overthrow of the Government, and with such inferred knowledge, each of the petitioners wilfully entered into the conspiracy alleged in the indictment, from which in turn it could be inferred that each petitioner had the specific intent to overthrow the Government by force and violence as speedily as circumstances would permit. There was here no "clear, convincing and unequivocal proof"; no "solidity of evidence" which left the issue free from doubt; no such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that

the individual petitioners had committed the serious offense charged in this indictment with the requisite criminal intent. *Baumgartner v. United States*, 322 U.S. 665, 671; *Hartzel v. United States*, 322 U.S. 680; *N.L.R.B. v. Col. En. & St. Co.*, 306 U.S. 292, 299.

4. The essential elements of the offense could not, consistent with the Constitution, be established by mere proof of association in the Party. *Wieman v. Updegraff*, 344 U.S. 183, 191; *Schneiderman v. United States*, 320 U.S. 118, 136; *Kotteakos v. United States*, 328 U.S. 750, 772-3; *Von Moltke v. Gillies*, 332 U.S. 708, 727; *Stack v. Boyle*, 342 U.S. 1, 5, 9. Moreover, as the court below recognized (Appendix A, p. 10), since the decision of this Court in *Dennis*, Section 4(f) of the Internal Security Act (64 Stat. 991, 50 U.S.C. 783 f) has become applicable to all prosecutions under the Smith Act and neither the holding of office nor membership in the Party constitutes per se a violation of any criminal statute. In the view of the courts below, the statute enacted by Congress must be construed as preventing convictions upon mere proof of membership or officership in the Party, but a jury may justifiably infer guilt if the proof shows membership *and* "activities" in the Party, even if none of the activities were in any way unlawful (Appendix A, pp. 34-5), and were indeed constitutionally protected. Such a construction is contrary to the history and plain purpose of the statute. S. Rep. No. 1358 (to accompany S. 2311), 81st Cong., 2d Sess.; S. Rep. No. 2369 (to accompany S. 4037), 81st Cong. 2d Sess.; H. Rep. 3112 (Conf. Rep.), 81st Cong., 2d Sess.; 96 Cong. Rec. 13739, 13761, 14491, 14500. ("Section 4, requires

individually incriminating evidence of active participation in the activities prohibited" (S. Rep. No. 1358, supra, pp. 19, 20).

The drawing of inference of guilt from lawful association and lawful speech and conduct runs counter to the basic provisions of the First Amendment. That Amendment was intended to abolish the common law crimes of seditious libel and constructive treason, with its criteria of "bad tendency". Chafee, *Free Speech in the United States* (1920), pp. 20, 201. Proof of an unlawful intent such as the one here involved can no longer be established by reliance upon some isolated utterance which does not call for the accomplishment of any forbidden act, but which in the opinion of a Court or jury may appear to be rank error, exaggeration, vilification or even false statement. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects." *DeJonge v. Oregon,* 299 U.S. 353, 365. See also *Herndon v. Lowry,* 301 U.S. 242; *Cantwell v. Connecticut,* 310 U.S. 296; *Taylor v. Mississippi,* 319 U.S. 583; *Keegan v. United States,* 325 U.S. 478; *Burstyn, Inc. v. Wilson,* 343 U.S. 495; and *Baumgartner, Hartzel, Schneiderman and Klapprott, supra.*

The rulings of the Courts below run counter to historical and legal precedent. They do violence to the basic postulates enunciated by this Court in *Dennis* as demanded by the Constitution. It is submitted that review

here is urgently necessary if fundamental rights upon which the security of the nation depends are to be maintained.

IV.

THE CONSTRUCTION OF THE CONSPIRACY STATUTE BY THE COURTS BELOW WITH RESPECT TO "OVERT ACTS" WHICH PERMITTED THE JURY TO DRAW INFERENCES OF AN INTENT TO FURTHER THE OBJECTS OF THE ALLEGED CONSPIRACY FROM MERE SPEECH AND ASSEMBLY WAS ERRONEOUS AND VIOLATED THE PROVISIONS OF THE FIRST AMENDMENT.

This is the first occasion that this Court has been called to pass upon the construction of the "overt acts" provision of the general conspiracy statute (18 U.S.C., Section 371) as applied to Smith Act prosecutions. Since the courts below in effect treated the prosecution of the indictment here as a "standard conspiracy" without "any element of speech", the normal day to day activities of the petitioners in the Party, concededly lawful, were turned into "overt acts" and made to serve as proof of guilt. This presents an issue which should not be left unresolved by this Court.

Of the 23 overt acts alleged in the indictment, although none were withdrawn from the jury's consideration (Cf., *Cramer v. United States*, 325 U.S. 1, 36, note 45), there was evidence introduced relating to only two (13 and 16). These were two "Lenin Memorial Meetings", one in 1949 and the other in 1950. We have heretofore discussed the entire evidence involving the 1949 public meeting. The 1950 meeting was also public, attended by about 1600 persons, at which a petitioner, Schneiderman, was

heard to say that this was a "Lenin Memorial meeting", and "mentioned Mr. Truman" in his speech (R. 8063). A later announcement in the press stated that the petitioner spoke on the "China situation", that he stated that it was the "key issue for 1950", and that the people demand to know the stand of their representatives on recognition of China (R. 8065-66). That is the entire evidence on the meeting.

Even in a "standard" conspiracy, an inference of an intent to effect the alleged unlawful objectives thereof cannot be drawn from the mere performance of a non-culpable act, absent evidence that the "act" was intentionally in causal connection with the unlawful object of the conspiracy. *United States v. Hirsch,* 100 U.S. 33, 34; *Lonabaugh v. United States,* 179 Fed. 476, 481 (C.A. 8, 1910); *Tillinghast v. Richards,* 225 Fed. 226 229-33 (D.C. R.I., 1915). If this were not so, all would be swept within the conspiracy dragnet who associated in any way with alleged unlawful conspirators.

There was not the slightest evidence, with respect to either "overt act", of any advocacy or teaching of the overthrow of the Government of the United States by force and violence. The purposes of the meetings were conceded lawful. Yet, it is asserted by the court below that the jury could properly find beyond a reasonable doubt that the aforesaid petitioners, by their mere appearance at these meetings, carried the "illegal design into the field of action" (Appendix A, p. 28). The effect of the rulings of the courts below is to make any meeting under the auspices of the Party, or any utterances of a Communist on any subject an overt act in the conspir-

acy charged. It must also be recalled that "the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists." (Jackson, J. as Circuit Justice in *Williamson v. United States,* 194 F. 2d 280, 284 (C.A. 2, 1950).

Nothing in *Dennis* indicated that this Court had repudiated the fundamental constitutional principles enunciated in *Stromberg v. California,* 283 U.S. 359; *Herndon v. Lowry,* 301 U.S. 242, and *DeJonge v. Oregon,* 299 U.S. 353. Indeed, the vitality of those decisions was reaffirmed after *Dennis* in *J. Burstyn, Inc. v. Wilson,* 343 U.S. 495, 500, note 8. Those cases distinctly held that an inference of guilty conduct cannot be drawn from lawful participation in the activities of the Communist Party. This Court stated that the right of an accused to enjoy his personal right of free speech and to take part in a peaceable assembly having a lawful purpose was "the essence of his guaranteed personal liberty". *DeJonge v. Oregon,* supra, p. 366. The courts below have held to the contrary. Such a serious conflict should be resolved by this Court, for as Justice Jackson observed in *Williamson,* if inferences of guilt can be drawn from "overt acts" similar to the ones here involved, "it can equally well be drawn from many other opposition speeches by non-communists" (p. 283).

V.

THE REFUSAL OF THE TRIAL JUDGE TO GRANT PETITIONERS' MOTIONS FOR MISTRIAL BASED ON PUBLICATION OF THE "LONG SECRET F.B.I. REPORT" ON THE EVE OF SUBMISSION OF THE CASE TO THE JURY AND FOR A CONTINUANCE OF THE TRIAL AT ITS COMMENCEMENT BECAUSE OF PUBLICATION OF "THE PHILBRICK STORY" DEPRIVED PETITIONERS OF A FAIR AND IMPARTIAL TRIAL WITHOUT DUE PROCESS OF LAW.

1. This Court recently stated in *Remmer v. United States,* 347 U.S. 227, that any private communication in a criminal case "directly or indirectly", with a juror about the matter pending before the jury is deemed presumptively prejudicial (p. 229). As the Statement of The Case herein makes clear, the communication of the "F.B.I. Report" to the jurors could hardly have been more direct than if a copy of the Report had been mailed to each of them during their deliberation. The Report was knowingly and intentionally delivered for public consumption by a nationally prominent figure highly placed in the Department of Justice, the prosecutor of the indictment herein. The Report purported to determine the very issues which the jury was about to consider, and the shrieking headlines were as damaging, if not more so, than the Report itself. The trial judge constantly admitted evidence offered by the respondent to establish "the nature and character and aims and objectives of the Communist Party" (106 F. Supp. 892, 900, 906, 937; App. Item 2 (K), pp. 47-48). It was argued by respondent that the evidence showed that "the principles of Marxism-Leninism" were equivalent to advocacy and teaching of the forcible overthrow of the

Government. Under respondent's "inference upon inference" theory, these issues became fundamental in the case and were hotly contested by petitioners. It was a direct interference with the administration of justice for the prosecutor, or its agents, to publicly advise the jury on the eve of their deliberations, and after arguments of counsel, that the Director of the Federal Bureau of Investigation had a "highly confidential" and "long secret" report that the Party "teaches and advocates the overthrow and destruction of the United States Government by force and violence" and that the Communists "try by means of cunningly phrased arguments and allegations to disavow their advocacy of overthrow of Government by force and violence". Such a communication from the prosecution "tipped the scales" and made a fair decision impossible. *Remmer v. United States,* 347 U.S. 277; *Berger v. United States,* 295 U.S. 78, 88; *Shepherd v. Florida,* 341 U.S. 50, 51; *Delaney v. United States,* 199 F. 2d 107 (C.A. 1, 1952); Note, *Controlling Press and Radio Influence in Trials,* 63 Harv. L. Rev. 840 (1950).

It is doubtful that any instructions under the circumstances could have saved the situation. See, *Boyer v. United States,* 132 F. 2d 12, 13 (App. D.C., 1942); *Kirsch v. United States,* 174 F. 2d 595, 601 (C.A. 8, 1949); *United States v. Manne,* 84 F. Supp. 785 (D.C. Del., 1949). The trial judge insisted upon putting only one compound question to the jury, which was meaningless, insisting that the answer of the juror would have to be accepted without further explanation. The judge refused to give a special instruction on the matter (App. Item 2(q), pp. 69-70), and

enjoined any inquiry after the verdict. 106 F. Supp. 906, 925.

The Court of Appeals states: "With the trial court, we believe, to say the least, the incidents were extremely regrettable in the public interest" (Appendix A, p. 39). However, the Court of Appeals holds that the trial court was justified in deciding "to trust the jury" (id., p. 38) and that it is anomalous for petitioners to claim any constitutional rights while denying them to public officials (id., p. 39). In *Remmer, Berger,* and *Delaney,* the trial courts decided "to trust the jury", but this Court and the Court of Appeals reversed. Petitioners had the right to a fair and impartial trial, to the appearance of justice as well as justice itself. Improvident communications may improperly influence the most honest and rational exercise of judgment. *United States v. Shaughnessy,* 347 U.S. 260. Moreover, if the prosecutor, purportedly acting pursuant to his conception of the public interest and his right to publicly express his views, chooses to issue a communication directly and inevitably resulting in prejudice to an accused on trial, then the prosecutor must accept the consequence that the judicial department, charged with the duty of assuring the accused a fair trial before an impartial jury, will find it necessary to grant a new trial in the interests of justice according to the constitutional mandate. *Delaney v. United States,* supra, p. 114. See the concurring opinion of Mr. Justice Frankfurter in *Pennekamp v. Florida,* 328 U.S. 331, 354-66.

2. The publication of the "Philbrick Story" was not simply the publication of sensational headlines at the

commencement of the trial. Philbrick was described as one whose "electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11'." The so-called "Communist 11" were named in this indictment as alleged co-conspirators with petitioners. The publication announced that Philbrick's story would run in serial form and reveal "how the Communists intend to overthrow the U.S. government and when". Thus, from January 20, 1952 through February 7, 1952, both preceding and following the commencement of the trial, the community from which the jury was selected read the testimony of a witness as if he were at the trial, testifying to "when the Reds will strike", "exposure of the Communist Plot", "Ruthless Underground Red Tactics", etc., etc., without any opportunity on the part of petitioners to confront the witness or to object to patently inadmissible testimony. It was a deprivation of petitioners' rights to a fair and impartial trial to refuse to grant a continuance until 60 days after the conclusion of the serialized publications. Contrary to the view of the Court of Appeals a continuance was not requested "until Communism would have become a dead issue" (Appendix A, p. 39); it was only requested long enough for the prejudicial effect of the "Philbrick" stories to become dissipated. *Shepherd v. Florida, supra; Delaney v. United States, supra.*

This Court has stated: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed

by law." *McNabb v. United States,* 318 U.S. 332, 347. These civilized standards of procedure appear not to have been met here and these serious questions in the administration of Federal criminal justice should be reviewed by this Court.

CONCLUSION.

The petitioners are not the first Americans to be prosecuted for their political opinions and associations. In the case of one alleged Communist, this Court, through a great chief justice, reversed the conviction, expressing the view:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political dissension, to the end that government may be responsive to the will of the people, and that changes, if desired, may be made by peaceful means."
>
> *De Jonge v. Oregon,* 299 U.S. 353, 365.

The petitioners here are all Californians. In the case of another Californian, again an alleged Communist, this Court, again through Chief Justice Hughes, directed a reversal, stating:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369.

The petition for writ of certiorari should be granted, the writ issued, and the judgments of conviction below reversed with instructions to the District Court to grant petitioners' motions for judgments of acquittal.

Respectfully submitted,

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SUBJECT INDEX

PAGE

Preliminary statement 1

1. Reply on the question of incitement 3

2. Reply on the question of clear and present danger 9

3. Reply on the question of the meaning of the word "organize" 12

4. Reply on discussion of the facts 15

5. Reply on the question of "overt acts" 30

6. Reply on the question of the F.B.I. report and motion for mistrial 32

Conclusion 34

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Dennis case, 341 U. S. 494	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 25, 30
Fox v. Washington, 236 U. S. 273	6
Gitlow v. New York, 268 U. S. 652	5
Offutt v. United States, 348 U. S. 11	34
Remmer v. United States, 347 U. S. 227	33
Schneiderman v. United States, 320 U. S. 118	24, 27
United States v. Flynn, 216 F. 2d 354	12
United States v. Frankfeld, 198 F. 2d 679	6
United States v. Mesarosh, 223 F. 2d 449	6, 12

STATUTE

United States Constitution, First Amendment 3, 4, 6, 7, 8, 11, 16, 19, 29

TEXTBOOKS

Chafee, Free Speech in the United States (1920), pp. 20, 201 4

Chafee, Free Speech in the United States (1948), p. 163 14

4 Eliot's Debates (1836), pp. 546-80 4

58 Harvard Law Review (1944-45), pp. 226, 815, Hurst, Treason in the United States 4

Howell's State Trials (Lond. 1817), Vols. XXII-XXIII 4

Miller, Crisis in Freedom (1951), p. 85 4

IN THE

Supreme Court of the United States

October Term, 1955

No. 308

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES.

Preliminary Statement.

The plain purport of respondent's brief is to obtain, without a hearing by this Court, a substantial revision of the principles enunciated by this Court in *Dennis* and to facilitate prosecutions under the Smith Act unencumbered by fundamental restrictions of the Constitution. Respon-

dent maintains that the Smith Act punishes all contemplated advocacy and teaching of proscribed doctrines with seditious intent, even if such advocacy and teaching be unaccompanied by any incitement or call to action. Respondent urges that the Smith Act can be constitutionally applied to any accused without any finding of "clear and present danger" by the trial court; that "clear and present danger" can be equated solely with strained "world conditions" and that such finding can initially be made by any appellate court. It is argued that proof of membership and officership in the Communist Party with lawful activities therein is sufficient to establish each petitioner's connection with the conspiracy charged in the indictment herein as well as the specific intent of each of the petitioners. Even admittedly lawful acts of speech and assembly within the Communist Party, respondent maintains, are "overt acts" of seditious conduct in furtherance of the conspiracy charged in the indictment. It is argued, without substantiation, that Congress intended that the "organize" clause of the Smith Act should apply to even the recruitment of a single member into the Communist Party, thus effectively foreclosing the bar of the statute of limitations from any charge of conspiracy to organize the Party as a vehicle to advocate and teach proscribed doctrines. It is also urged that all "organs of government" may publicly comment on the specific issues of a pending Smith Act trial to the prejudice of an accused without substantial relief by the courts. Thus, respondent's 72-page brief

emphasizes the profound significance of the questions presented.

The reply which follows is in the order originally adopted in the petition for writ of certiorari.

1. Reply on the Question of Incitement (Pet. pp. 9-10, 21-35; Resp. Br. pp. 32-60).

Respondent contends that this Court's opinions in *Dennis* show that the function of a charge with respect to language of incitement in a prosecution under the Smith Act is simply to draw a clear distinction between "discussion" protected by the First Amendment and "advocacy" of forcible overthrow of the Government which Congress may validly proscribe. It as argued, that this Court "has never suggested that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55). Respondent concludes, therefore, that the distinction is sufficiently made, and was made below, by an instruction that the petitioners could only be convicted if they conspired to advocate the forcible overthrow of the Government "with the specific intent to cause or bring about such overthrow as speedily as circumstances would permit" (Resp. Br. p. 55).

Contrary to the view of respondent, this Court has never held, it is respectfully submitted, that a statute may validly proscribe all advocacy of proscribed doctrines, so long as discussion of those doctrines is left unimpaired. That the Constitution requires a more narrow construction of the Smith Act than is now contended for by respondent

is evident from chief Justice Vinson's opinion in *Dennis*, where the trial court's instruction that the Smith Act condemns only advocacy in language of incitement to action, was held to state the facts "essential" to establish the substantive crime involved in the conspiracy charge. 341 U. S. 494, 511-12.[1] See also, the concurring opinion of Justice Frankfurter, 341 U. S. 494, 518, 533-39, 644-46, 549. If the Smith Act simply draws a line between discussion of ideas protected by the First Amendment and any advocacy of the forcible overthrow of the Government, then indeed a "new statute" different from that applied in *Dennis* is here involved, the constitutionality and application of which require review by this Court. The view of respondent that the advocacy and teaching of the principles of Marxism-Leninism are proscribed by the Smith Act, even if unaccompanied by any call to action, so long as the advocate or teacher is found by the jury to possess seditious intent is reminiscent of ancient and discarded doctrines of seditious conspiracy and constructive treason. Chaffee, *Free Speech in the United States* (1920), pp. 20, 201; Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226, 815 (1944-45); 4 Elliot's Debates (1836), pp. 546-80; Howell's *State Trials* (Lond. 1817), Vols. XXII-XXIII; Miller, *Crisis in Freedom* (1951), p. 85.

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[1]The approved instruction stated that the law condemned "the teaching and advocacy of action . . . . by language reasonably and ordinarily calculated to incite persons to such action". This *addition* of the requirement of incitement to that of advocacy is certainly something more than the drawing of a line between discussion and advocacy. Just as there can be discussion without advocacy, so there can be advocacy without incitement. It would seem clear accordingly that incitement brings in a new, not simply a clarifying element.

In the Court below, respondent argued that the numerous holdings of this Court which emphasized the importance of distinguishing between advocacy of doctrines, and advocacy of doctrines in language of incitement to action, were *"oibter dicta"* (App. Br. p. 332). The same argument is now more guardedly couched in respondent's statement that this Court "has never suggested," *in a Smith Act prosecution,* "that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55). This argument suggests the concept that the line is to be drawn at a different point in a Smith Act case than in other types of cases. The written record is quite to the contrary. Each of the judges who expressed any opinion in *Dennis* from its inception to its conclusion, emphasized the requirement of an instruction in terms of incitement (Pet. pp. 22-23). Chief Justice Vinson thought it was "essential" (p. 512); Justice Frankfurter held that the charge of the trial judge "had properly explained to the jury what it is that the Smith Act condemns" (p. 518); Justice Jackson stated that "direct incitement by speech or writing can be made a crime" (p. 571). There was not a single disagreement with the view of concurring Judge Chase in the Court of Appeals, who emphasized the specific construction of the statute by the trial judge with respect to the issue of incitement to action, and stated that this construction of the Act was "demanded" in view of the decision of this Court in *Gitlow v. New York,* 268 U. S. 652, 664, 665 and the requirements of the Constitution. 183 F. 2d 201, 235. To assert, as does respondent, that this Court has "never suggested" that in a Smith Act case the distinction between constitutionally protected speech and speech which Congress may validly proscribe must be phrased in terms of incitement.

is simply to argue that a body of decisions by this Court which covers a period of at least four decades, from *Fox v. Washington*, 236 U. S. 273 to the decision in *Dennis*, are inapplicable in a Smith Act case. See Justice Frankfurter's review of the decisions, 341 U. S. 494, 533-39.[2] This issue as to whether the First Amendment should be given a special interpretation in Smith Act cases, should be reviewed by this Court.[3]

Respondent's attempt to avoid the issue by asserting that Judge Medina's instructions in *Dennis* are not required to be used "verbatim" is fruitless in the light of the undisputed record below (Pet. Br. p. 21). The courts

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[2]Clearly, the overwhelming majority of the lower courts has interpreted *Dennis* as requiring an "incitement" instruction in addition to an instruction on seditious intent. In *United States v. Mesarosh*, 223 F. 2d 449 (C. A. 3, 1955), District Judge March, the trial judge, gave such instruction, and the majority and minority in the appellate court differed only on the sufficiency of the evidence to establish a conspiracy to advocate in language of incitement to action. See, the opinion of Hastie, J., dissenting, pp. 459-66. Here the instruction was not even given, and the record is barren of any evidence to support such a finding. Counsel is advised that a petition for writ of certiorari in the *Mesarosh* case will soon be filed in this Court. District Judge Dimock in *United States v. Flynn* in the second New York Smith Act prosecution emphasized the instruction. District Judge Chesnut gave the instruction in *United States v. Frankfeld*, the Baltimore prosecution, and Chief Judge Parker in the appellate court noted the significance of the instruction in his opinion on appeal. 198 F. 2d 679, 687 (C. A. 4, 1952). The instruction was given by District Judge Picard in the trial in Detroit; by District Judge Harper in the trial in St. Louis; and by District Judge Breitenstein in the trial in Denver. As the respondent itself notes, the two trial judges in Hawaii and Seattle, respectively, both followed District Judge Mathes, the trial judge here, in subsequent trials, using the instructions of Judge Mathes almost verbatim (Resp. Br. p. 57, note 25).

[3]Such a review would lead to consideration of the question as to whether it is either constitutionally permissible or practicably possible to apply the First Amendment differently to different groups.

below made it clear beyond cavil that any advocacy of the forcible overthrow of the Government with seditious intent was a crime under the Smith Act, "whether it is language of incitement or not" (Pet. Br. pp. 9-10). In fact, respondent here does not predicate its argument on the view that any instruction on incitement or call to action was given below; its argument is that none need be given if an instruction on intent is rendered to the jury. Thus, the respondent here is in complete accord with the statement of the trial court below that an accused is guilty of a violation of the Smith Act if he "get out here on the front steps of the Federal Building and in the best of well modulated tones, almost timid, could make this speech to be reproduced on a recorder and played to the jury and the jury might find he advocated the overthrow of the government by force and violence, and he advocated it in certain language and in a certain tone of voice which you and I might consider mild, very mild. The jury might decide that he did it with the intent to accomplish the overthrow of the government of the United States by force and violence as speedily as circumstances permit" [R. 12442-3]. This Court in *Dennis* did not countenance such construction, and review is necessary to make clear whether such breach in the First Amendment by the courts below is consistent with the guarantee of Freedom which that amendment contains. Respondent mistakenly poses the issue as one between *intent* to use language of incitement, and *intent* to forcibly overthrow as speedily as circumstances permit (Resp. Br. p. 53). The real issue is whether the Smith Act punishes an *agreement* to advocate the forcible overthrow of Government, unless the *agreement* is one to use language of incitement. The question is not one of subjective intent; it is one of proof

of an objective agreement, whether by circumstantial evidence or otherwise.[4]

In addition, respondent, by its own arguments on the question presented here, makes clear the need for review by this Court. If the function of a charge with respect to language of incitement is "to draw a clear distinction" between speech which is and is not protected under the Constitution (Pet. Br. p. 27), all the more reason why the charge should have been given. If this Court has "never suggested that the distinction must be phrased in terms of incitement" (Resp. Br. p. 55), then clearly this Court should review a holding that a distinction less sharply drawn is adequate to satisfy the requirements of the Constitution.

In the light of the fact that *Dennis* could not have held the incitement instruction unnecessary, it having been given in that case, there is presented here at the very least a construction of this statute never passed on by this Court. This construction, it is apparent even from respondent's brief, raises fundamental First Amendment problems which should be reviewed by this Court. While the portion of the trial court's instructions (Br. pp. 56-57) may adequately distinguish, accordingly to respondent, between a conspiracy "to advocate rather than to express ideas" (Resp. Br. pp. 56-57), still this Court must determine whether in a Smith Act prosecution the jury must not also be instructed that the Smith Act punishes only

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[4]The respondent's contention (p. 58) that the petitioners' argument relates to the imminence of the overthrow misses the point completely. The question is not here involved as to when the alleged agreement may be consummated; rather it is whether the agreement if and when consummated will include incitement to action.

a conspiracy to advocate and teach in language of incitement to action and as a rule or principle of action (Pet. pp. 27-29).

Moreover, although respondent declines to accept the premises of the opinion of the Court of Appeals (Resp. Br. pp. 58-60), respondent cannot dispute that the affirmance of the trial court's rulings was fundamentally founded on the view that the 1948 version of the Criminal Code had effected "a drastic change in the issues of a Smith Act prosecution" (Resp. Br. p. 59). In actuality even the Court below did not purport to rely on *Dennis* or prior decisions of this Court in support of the position for which respondent now contends. The Court below held, in effect, that *Dennis* was "as of yesterday"; that a "new statute" now exists; that the conspiracy charged is now the "standard conspiracy"; and that even if the planned advocacy and teaching are protected by the First Amendment, still the "new" Smith Act could be constitutionally applied. Such a decision and judgment (concededly erroneous according to respondent), if permitted to stand, will become operative law not only for the Ninth Circuit, but may well be adopted in other jurisdictions. The resultant confusion in the administration of the Act and the possibilities of substantial injury are so manifest as to emphasize the importance for granting review herein.

2. Reply on the Question of Clear and Present Danger (Pet. pp. 6-9, 35-40; Resp. Br. pp. 60-64).

It is clear (Resp. Br. p. 60) that respondent cannot sustain the view of the trial court that the mere existence of the prescribed specific intent is equivalent to the existence of a clear and present danger (Pet. Br. pp. 36-38). There is also no dispute that, because of the trial court's

view, no consideration was given to the questions as to whether or not, on the evidence, the petitioners had the power to bring about any attempt to forcibly overthrow the Government or whether the nature of their activities indicated any such purpose or danger (Pet. Br. pp. 38-40).

Respondent is reduced, therefore, to making the following argument: In Smith Act prosecutions, neither the jury nor the trial judge before submission of the evidence to the jury, are required to make any finding of clear and present danger, formal or otherwise. The finding may be made initially in the Court of Appeals, or initially by this Court. The finding by the Court of Appeals, according to respondent, that "world conditions at the date of [the Dennis] trial had not changed for the better when trial in the instant case was had" (Resp. Br. p. 63) was a sufficient finding of "clear and present danger."[5] Indeed, respondent states, "a contrary conclusion would have warranted review by this Court" (Resp. Br. p. 63).

It is submitted that these admissions and arguments are sufficient in themselves to call for review by this Court. In *Dennis*, this Court held that the question of the existence of a clear and present danger need not be submitted to the jury, but that the court "must examine

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[5]The Appellate Court specifically disavows the intention of making such a finding. First, it says that the jury determined the issue: "The instructions of the trial court clearly show that, if the jury convicted under the rules of law there laid down they would have necessarily found a clear and present danger existed." (Appendix A to Petition p. 30); Second that the function is one exclusively for the Supreme Court: "It may be that prospects of larger policy or changes in the look of international affairs should be viewed to fix the acts proved here in perspective. But, as we understand it, as a lower federal court that is not our function." (Appendix A to Petition p. 41).

judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction." 341 U. S. 494, 515. This Court gave no indication that the trial judge could abdicate this function, and refuse to consider such relevant considerations as the power of the accused to bring about the evil or the nature of their activities. Nor is it apparent, how, without such initial finding, an appellate court on a cold record could make such evidentiary findings (Pet. Br. p. 40). Such findings require an evaluation of the evidence which can only be made by a Court which saw and heard the witnesses, and was therefore in a position to determine questions of credibility and of the weight of the evidence.

Moreover, respondent equates strained "world conditions with "clear and present danger" (Resp. Br. p. 62). This is contrary to the ruling in *Dennis* and substantially undermines the protective provisions of the First Amendment (Pet. Br. pp. 38-40). Dennis holds that the state of world conditions is one element of clear and present danger, but it also declares that equally important issues are the power of the particular accused to bring about an attempted forcible overthrow of the Government and the nature of their activities directed to such an end. This Court has never held that the exercise of constitutionally protected freedoms may be abridged from day to day solely on the basis of political conditions. On the contrary, the gravity of the evil must be "discounted by its improbability," and "where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." 341 U. S. 494, 510, 516. The courts

below, and respondent here, treated these fundamental criteria as mere "words" (Pet. Br. p. 11, note 6). The trial court ruled that neither judge nor jury need consider whether the evidence established that the petitioners had the power to bring about the evil at which the law is directed or whether the nature of petitioners' activities was such as to create a clear and present danger. This Court should not permit such drastic obliteration of a rule of law intended to delimit the areas of personal freedom and the power of the State.

3. Reply on the Question of the Meaning of the Word "Organize" (Pet. pp. 10-11, 41-46; Resp. Br. pp. 64-68).

Respondent does not dispute that the trial courts are in conflict with respect to the meaning of the word "organize" as used in the Smith Act. In the second and third circuits, charges of conspiracy to organize have been dismissed as barred by the statute of limitations. *United States v. Flynn,* 216 F. 2d 354, 358 (C. A. 2, 1954); *United States v. Mesarosh,* 223 F. 2d 449, 465 (C. A. 3, 1955). It follows, therefore, that in certain federal jurisdictions neither a charge of conspiracy to organize the Communist Party as a proscribed organization, nor the substantive charge, can be sustained. In other jurisdictions, a contrary view obtains and prosecutions may be brought. Such substantial conflict in the administration of the statute should be resolved by this Court, especially in the light of the conceded novelty of the issue as applied to the Smith Act.

Respondent has been unable to produce one decision which supports the interpretation and construction of the statute by the courts below. It is also unable to distinguish the unbroken line of decisions which are opposed

to the interpretation for which it contends (Pet. Br. pp. 41-43). So far, therefore, as the applicable law is concerned, the construction of the statute by the courts below is clearly erroneous.

Respondent's argument is bottomed upon an alleged Congressional intent unsupported by any affirmative evidence thereof. The contentions in support of this argument are merely speculative and conjectural, and lacking in logic. It is asserted that Congress must have enacted the "organizing" section of the Smith Act "to reach the leaders of such groups" as the Communist Party, and that the construction for which petitioners contend would mean that the "organize" clause of the Act could never have been "applied to the leaders of the Communist Party of the United States which was first organized long before 1940" (Resp. Br. p. 65).[6] In the first place, this Court cannot assume that the Smith Act was passed to attaint the Communist Party. In the second place, the interpretation of the word "organize" by the courts below would encompass any member of the Party, not only its "leaders," as witness the prosecution herein.[7] In the third place, if the Smith Act was intended to be applied to the members and officers of the Communist Party, other provisions of the Act which condemn "advocacy and teach-

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[6]Apparently the concept that the Smith Act was intended to apply to the Communist Party did not occur to the Attorney General's office unil 1948, when the Dennis Indictment was filed, a few days less than three years after the reconstitution of the Party.

[7]Respondent refers to the organize provision as the "leadership" clause. There is nothing either in the language or history of the act supporting this definition. Moreover the trial judge's instructions did not define the terms in the manner Respondent argues is correct. Under the judge's instructions, recruiting of a single member, by the humblest member of the Communist Party constitutes organizing.

ing," "distribution of literature" and "knowing membership" were made available by Congress. No legislative purpose could therefore be frustrated in treating the "organizing" section of the Smith Act as applicable only to organizations which were formed after the passage of the act and allegedly advocated proscribed doctrines, subject only to the bar of the statute of limitations.

Respondent urges this Court to ignore the decisions of the California courts on the precise issue here presented (Resp. Br. pp. 65-68). It argues from a single colloquy in 1935 (not 1940) (Resp. Br. p. 67, note 6), that Congress intended to model the Smith Act after the New York criminal anarchy statute and that New York "has never given the narrow interpretation urged here by petitioners" (Resp. Br. p. 67). Respondent overlooks the fact that the issue never arose in New York. It is plain from the résumé by Justice Jackson in *Dennis*, 341 U. S. 494, 562, note 2, that the initial criminal anarchy statutes of 1909 were the prototypes of the criminal syndicalism statutes of 1917-19, essentially the same in language, and that these state statutes served as a model for the Smith Act. The language of the California Criminal Syndicalism Act and the Smith Act is markedly identical (Pet. Br. pp. 42-43).[8] Thus, the construction of the law by the California courts is apposite and reflective of Congressional intent.

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[8]Professor Chafee observes that the criminal syndicalism statutes take their "origin from New York Anarchy Act of 1902." *Free Speech in the United States* (1948), p. 163. "In the legislative sessions which followed the Armistice (1918), emergency laws against new crimes labeled as anarchy and criminal syndicalism were adopted by state after state with a striking coincidence of phraseology. . . . About one-third of the states have applied the statutory scheme to the new crime of criminal syndicalism." *supra*, pp. 143, 165.

Such a construction of the law in California hardly turned out to be "absurd" or "frustrating" as respondent prognosticates for the Act herein (Resp. Br. p. 65). Although the California courts held that the "organizing" section of the law could not be applied in 1919 to the I.W.W., organized many years before, still other provisions of the law were persistently used against its officers and members. Justice Jackson stated in *Dennis* (*supra*, note 2): "In California alone, 531 indictments were returned and 164 persons convicted."

There appears to be no foundation in law or legislative history for the broad construction of the Act by the courts below, which raises questions of serious constitutional import (Pet. Br. pp. 44-46). The trial courts are in conflict and the administration of the Act diverse. The question would appear to be ripe for this Court's adjudication.

4. Reply on Discussion of the Facts (Pet. pp. 6-18, 47-76; Resp. Br. pp. 3-40, 46-50).

The respondent does not dispute the accuracy of the statment of facts in the petition. That statement together with the respondent's own summary, in the Court below, of the evidence with respect to each individual petitioner (Appendix C to petition) and the charts graphically delineating the crucial evidence (or lack thereof) relating to each individual petitioner (Appendix E to petition) stand unchallenged.

The respondent does not quarrel with the proposition that the connection of each petitioner with the alleged conspiracy and his or her specific intent can be established only by the evidence directly related to each individual petitioner. In the entire 72-page reply brief no

attempt is made to state or analyze the evidence as to each petitioner separately. From the undisputed facts as set forth in the petition, it is clear that the convictions here can be sustained only upon the premise that membership, officership and innocent or protected activity in the Communist Party constitute sufficient evidence of an individual's connection with a conspiracy to advocate the forceful overthrow of our Government and of his intent to achieve that objective as speedily as possible. This premise presents serious First Amendment problems which the respondent avoids in its brief.

This avoidance is accomplished by a process of selecting some evidence as to each of the petitioners, third party declarations to which none of the petitioners are in any way connected, and quotations from writings not tied in to any petitioner,[9] and then arranging them in a sequence, calculated to establish the respondent's thesis.

(a) Pages 5 to 15 of the respondents' brief are devoted to a summation of the positions held by petitioners in the Communist Party. They establish connection with the Communist Party—not with the conspiracy charged. Insofar as the Communist Party is concerned it is not the conspiracy charged; its organization and utilization as a vehicle for the proscribed activity is what the indictment alleges.

In *Dennis* this Court did not hold that membership and activity in the Communist Party was proof of a conspiracy which could be punished under the Smith Act. To the contrary, it predicated its entire application of

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[9]Petitioners are treated as having adopted as their own quotations from books they are never shown to have read or used in any manner.

the Act upon the proposition that the petitioners in that case engaged in the conspiracy charged by planning and intending to organize and utilize the Communist Party for the purpose of engaging in the forbidden advocacy. In this case the Government, while relying upon *Dennis*, seeks to justify the convictions upon the premise that it is the Communist Party which is the conspiracy, with membership and activity in the Communist Party, no matter how lawful that activity may be, constituting proof of participation in the illegal conspiracy. The reliance on and presentation in great detail of the legal activities of petitioners within the Communist Party is itself an indication of the infirmity of the proof on the issue of advocacy of force and violence.

Moreover, the respondent's conclusion that these petitioners were the dominant leaders of the California Party is unsupported by the record. For example, the highest office ever held by the petitioner Fox was City Section Organizer, by the petitioner Kusnitz, City Division Organizational Secretary, and by petitioner Steinberg, County Legislative Director; only four out of the eleven petitioners here involved were shown to have ever held any state office.[10]

In the *Dennis* case this Court upheld the constitutionality of the Smith Act as applied to the facts found by the Court of Appeals. The record of this case is so different from the facts found in *Dennis* that the constitutional questions arising out of the application of the statute to the facts of this case can in no wise be con-

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[10]Compare this with the *Dennis* case where all the defendants were jointly members of the top national governing body of the Party.

sidered as having been determined by *Dennis*. This is rendered apparent from the brief of the respondent itself when that brief is analyzed. Its assertion that the facts of this case are substantially identical with those in *Dennis* is not true.[11] In *Dennis* the finding was that the defendants acting jointly as a group reconstituted the Communist Party as an instrumentality which they controlled for the purpose of advocating the overthrow of the Government of the United States by force and violence. In this case the only common denominator among petitioners is membership in the Communist Party. There is no evidence showing an agreement among them to form or utilize the Communist Party as an instrumentality for the forbidden objective. The respondent is actually urging that all Communists (or perhaps Communist officer holders) may be found guilty of participation in the Smith Act conspiracy with the requisite intent regardless of their own conduct as such members or officers.

(b) It is alleged that the Communist Party at one stage characterized World War II as an unjust war having imperialist objectives (Resp. Br. p. 7, note 4). Reference is then made to Exhibit 28, "The History

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[11]Acceptance of the Government's view of the facts requires the finding by this Court, in the process of a ruling on certiorari, of facts contrary to the holding of the Court of Appeals, which said "Defendants themselves say that there were significant legal and factual differences between the situation in the *Dennis* case and the case at bar. We agree" (Appendix H to Pet. p. 7). The character of these differences is rendered apparent by the finding in the *Dennis* case of specific facts with respect to an agreement to convert the Communist Party into an instrument for illegal advocacy, whereas in this case the only evidence specifically referred to by the Court below is the holding of a "Lenin Memorial meeting" to "demonstrate for the Bill of Rights" and "protest against the current trial in New York of twelve national leaders of the Party". (Appendix A to Pet. p. 23).

of the CPSU," which sets forth the slogan raised in Russia in 1917 of "converting the imperialist war into civil war." From the characterization of the war as imperialist by the Communist Party, the conclusion is drawn that the Communist Party of the United States in 1941 supported the objective of converting the imperialist war into a civil war. Thus by tying together a position taken by the Communist Party of the United States in 1941 with the 1917 quotation, the respondent draws a conclusion with respect to the position of the Communist Party directly contrary to that which is revealed by its own conduct.

By this process of attributing to the petitioners statements which appeared in books circulated by the Communist Party, despite the uncontradicted evidence of conduct of petitioners inconsistent therewith, an artificial picture is created by the respondent. This imposition of responsibility for the contents of books to those who read and distribute them presents a serious question of freedom of speech and press, under the First Amendment.

(c) At pages 16 to 18 of the brief the respondent argues that the evidence of the duties of *petitioner Yates and separate petitioner Schneiderman* as state officials of the Party prove the joint control of all petitioners over the California Communist Party. First it is considered that *several* of the petitioners as top state officials rendered decisions "binding on lower bodies"; then, it is argued, it is thus established that *all* of the petitioners, including those holding no state position and who were allegedly bound by the decisions made by the state officials, are the dominant controlling figures of the State Party.

More important than this *non sequitur* is the fact that there is no showing of any common agreement to exert this dominance towards the illegal end charged. The respondent cites as an instance of "iron control" by petitioners the "purging of members who failed to follow the party line orders of the conspirators." Respondent can only be referring to persons expelled because they took the position that the replacement of the capitalist system by socialism was the issue then facing the American people. The Communist Party program and policy was opposed to this view because this program did not have majority support of the American people [Ex. 639; R. 44, 56, 4674-4708; App. Item 83, pp. 334-343; R. 4376-81]. The record shows that these expulsions were consummated through a democratic trial by and decision of a party membership meeting, and the expulsions themselves indicate that the Communist Party was following a policy of excluding from its ranks those who were advocating a program to be achieved by means other than the attaining of majority support. To permit such evidence to be utilized to prove a conspiracy by Communists to advocate the overthrow of the Government by force and violence is tantamount to taking the position that anything that Communists do, even opposition to force and violence, is proof of their participation in a conspiracy to violate the Smith Act. Such proposed indirect outlawry of the Communist Party and its members raises serious constitutional problems which this Court has never considered.

(d) Typical of the respondent's efforts to surmount the insufficiency of evidence here is the arbitrary distortion (p. 19) that the managing editor of the *People's World* was selected by the Central Committee of the

Party "in adherence" to the Communist International requirement of selection of editors "who have proven their loyalty to the cause of the proletarian revolution" (A 566). There was evidence of the selection of said managing editor but there was not a single word to indicate that this was done "in adherence" to the asserted principle of the Communist International. The respondent simply lifts out of context a quotation from a book written by Lenin in 1918 with respect to Russia and asserts that the appointment was "in adherence" to the "principles" set forth in the quotation. By this device of selection of quotations, unhampered by considerations of evidentiary foundation, the respondent artificially attaches an evil motive to a legal act thereby converting it into proof of participation in the conspiracy charged.

(e) At page 20 of the brief the respondent, by reference to "This History of the CPSU" [Ex. 28], attributes to the *People's World* the roles of advocating violent revolution utterly disregarding the actual content of that newspaper, which admittedly never contained any advocacy of violence.

(f) At pages 20 and 21 of the brief the importance of the *People's World* as a "guide to action" and as a basis for education in the application of Marxism-Leninism is stressed. It would appear reasonable that if, as undeniably is the case here, the paper urged only action within the framework of our constitutional system, this would be some evidence tending to negate the existence of the conspiracy. Respondent by some strange logic turns this into its opposite.

(g) The technique followed by the Government is further illustrated by its treatment of the "concentration

policy" of the Communist Party (pp. 22-23). Concededly, the Party sought to recruit as many members as possible from among workers in the basic industries and concentrated upon this as an objective. To establish the motive of petitioners who allegedly supported this concentration policy the respondent turns to two sources: (1) what was said at a 1944 national training school at which none of the petitioners was present and with respect to which none of them was shown to have any knowledge [A 58-60, Tr. 2140, *set seq.*; (2) to a quotation from "The History of the CPSU" [Ex. 28], to the effect that key transportation and communication facilities were the first properties occupied in the 1917 revolution in Russia [A 497, Ex. 28, p. 208; see Resp. Br. p. 23]. The only evidence as to the motives of any of these petitioners in engaging in the concentration policy is completely ignored. That evidence indicates that the Party and the petitioners who did participate in the concentration policy sought merely to recruit workers in a workers organization. The sole object of the concentration policy was "to encourage the workers in these industries to come forward and take leading roles in all respects of the progressive-democratic movement, in election campaigns, in fights around issues in the community" [R. 10429, 11084]. The issue as to whether these petitioners are to be bound by their own conduct or whether they shall be held accountable for passages selected by the prosecution from books and the evidence of informers as to incidents in the distant past with which none of the petitioners were associated presents a crucial question with relation to the right of association. For if a member of an organization may have his connection with a conspiracy and illegal intent proved by selected passages in books or

other writings distributed by an organization to which he belongs or by whatever anybody says during any meeting or other gathering of the organization, no matter how remote in time and relationship, and no matter how lacking in knowledge the individual is with respect to these incidents, then association indeed becomes a hazardous pursuit.

(h) The respondent's position with respect to the "underground structure" established by the Communist Party is even more extreme (pp. 24-26). In a footnote at page 24 the Government refers to the facts of other cases not a part of the record of this case and relies upon those facts as binding on these petitioners. To establish the purpose of the "underground structure" the respondent quotes from Gov't. Ex. 504, a book written by Lenin in 1918 without showing any relationship between the petitioners and the language quoted [A 566, see also A 521, 529-33; see Resp. Br. pp. 23-4]. Ignored is the only evidence relating to any of these petitioners that any secrecy which was pursued was intended to protect Communist Party members from loss of jobs, from physical attacks and from other harassment and persecution [R. 5901, 5911-28; Exs. FX, GC and DA; R. 5893, R. 10221-34, 10740-81, 10491-96, 11075-80; App. Item 76, pp. 290-93; R. 4471, R. 1332, R. 11069-71]. Thus again the language in books written during different periods and in other countries is attributed to petitioners although it is not shown that they have adopted the language of those books as specifically applicable to current conditions in the United States and despite the fact that the only evidence of the conduct of the petitioners is inconsistent with their adoption of that language.

(i). Reference is made (pp. 27-30) by the Government to the 1945 reconstitution of the Communist Party. However, it ignores the constitution of the Communist Party which specifically disavows the advocacy of the overthrow of the Government by force and violence. In *Dennis* a witness testified that the defendants in that case used that language as Aesopian language for the purpose of concealing their true objective. There was no such witness here. There was no evidence in this case that the petitioners or any of them understood the constitution of the Communist Party and particularly its disavowal of advocacy of force and violence as not meaning what it plainly says. Reliance is placed upon the statement of the petitioner Schneiderman at conventions to the effect that the party was going back to the fundamentals of Marxism-Leninism. This is the same Schneiderman as to whom this Court had held that his advocacy of Marxism-Leninism was not proof of advocacy of the overthrow of the government of the United States by force and violence. *Schneiderman v. United States,* 320 U. S. 118. Yet his statements of *Marxism-Leninism* now are applied to him and to other petitioners as establishing their advocacy of the violent overthrow of our Government.

(j) From pages 30-40 the respondent discusses Communist Party classes with respect to which two groups of outlines were introduced into evidence [Exs. 39, 613 and 6263, all practically identical, and Exs. 163, 450, 201, 213, 214].

It is conceded that the second group of outlines, which includes the only ones that any petitioners prepared, all contain disavowals of force and violence. These statements are brushed off by the assertion that they were prepared after the *Dennis* indictment. Here the Government as it does throughout its brief seeks to convert the legal to the illegal by the imputation of an evil motive. By this reasoning any disavowal of advocacy of force and violence by a Communist after the *Dennis* indictment is of no avail; proof of membership in the Party then would constitute unrebuttable proof of participation in the conspiracy charged.

But this attempt to convert into its opposite evidence favorable to petitioner becomes all the more transparent when it is noted that the first set of outlines, prepared before the *Dennis* indictment specifically state opposition to any attempt by a minority to win power and set forth the objective of the Communist Party as "the establishment of socialism by the free choice of a majority of the American people" [Ex. 626; R. 1788-92]. The outline goes on to say:

> "In the struggle for the program for peace and democracy, jobs and security, favorable conditions are created for the masses of our people to recognize, on the basis of their own experiences, the need for the eventual reorganization of society along socialist lines." [Ex. 626, p. 34.]

The respondent disposes of these facts by ignoring them; ignoring also that there was no proof that these petitioners adopted any other view as their own.

(k) In the place of these statements appearing in the outline—and it must be remembered that the respondent itself relies on the outlines as authoritative[12]—for ten pages (30-40) the Government interlaces third party declarations with selected quotations from some of the books referred to in the outlines.[13] The contents of the outlines themselves are conveniently disregarded. The outlines all include numerous quotations from the books listed—but *not a single one* of these quotations is referred to by the respondent.

Again and again the books and outlines introduced by the Government [Ex. 626, Tr. 1719] set forth warnings that the means of achieving socialism must be examined historically and depends upon concrete political conditions existing at the time in question in the country involved.[14] To follow the same methods in a democracy as were deemed necessary in Czarist Russia violates, according to the very books quoted by the respondent, the most fundamental precepts of Marxism-Leninism. [R. 10192-3; App. Item 47 pp. 205-6, Ex. 608, R. 483, Ex. 28, R. 1362, 2724; Ex. 12; R. 4143-4; App. Item 48

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[12]Any contention that the outlines were contrived is inconsistent with the Government's position that persons were expelled because of the "iron discipline" of the Party. They were expelled because they took a position opposed to that set forth in the outlines. The expulsions are a reflection of genuine policy; it follows that the outlines are also.

[13]At page 31 the Government places its reliance on the fact that outline deals with a revolutionary movement, ignoring both the statement in the outline that this refers to fundamental change, not force and violence, and an instruction to this effect given to the jury (Instr. 145, App. Item 28, p. 56).

[14]As has been noted above, the outlines indicated that in the United States the correct application of theory called for the winning of majority support to achieve social change through democratic processes.

pp. 206-207; R. 2982-4; App. Item 49 pp. 207-208, R. 2646, Ex. 147, R. 1126, Ex. 29, R. 2618; Ex. JO, R. 10386-97; App. Item 50 pp. 208-211; R. 2602, 2630, 2636, 2639-47; App. Item 51, pp. 211-17; R. 10276, 10417-19; App. Item 52 pp. 217-19, R. 10432-3; App. Item 53 pp. 219-21, R. 10332-5; App. Item 54, pp. 221-4]. The respondent insists that the program outlined for Czarist Russia in books studied in Communist Party classes must be deemed that of the Communist Party in the United States, despite the clear statement in the outlines and resolutions of the Communist Party of the United States of an entirely different program predicated upon the proposition that a current Marxist-Leninist program varies with time, place, and circumstances.

It also appears from the record that even among Communists there were sharp differences in the interpretation of Marxist-Leninist principles.[15] That statements made in Party classes did not necessarily reflect the views of the leadership of the Party or of any of the petitioners is clear. [R. 4732-4, App. Item 39, pp. 175-6; R. 4823-5, App. Item 40, pp. 176-7; R. 4426, R. 6766-67, Ex. 468; R. 6775-77; R. 4155, R. 4824, App. Item 40, pp. 176-7; R. 4914-15, App. Item 41, pp. 177-8.] The respondent's own witnesses testified that as teachers they received no instructions from the leadership of the Communist Party but merely utilized the outlines as they saw fit [R. 562-3, App. Item 43, p. 184.] With respect to most of the petitioners, no connection is established to any outline or

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[15] *Cf. Schneiderman v. United States*, 320 U. S. 118, 148, "With commendable candor the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that "some Communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal."

to any class; what is attributed to them is what was allegedly said in some classes and not what appears in the outlines.

At page 36 of the respondent's Brief is cited an instance in which a member of a class allegedly stated that a majority was not necessary in order to accomplish a revolution, that is, a change from capitalism to socialism. Completely ignored is the undisputed fact that the member of the class was expressing his own personal beliefs and not the position of the Communist Party [R. 1948-9, 1957-59, App. Item 45, pp. 186-88]. Thus defendants are held responsible not only for what took place in the classes at which they were not present and over which it was not shown that they exercised any control, but the Government imputes to them statements made during those classes which *admittedly* did not even represent the position of the Communist Party.

(l) Evidence admitted for limited purposes is treated as though it were to be considered without any limitation. Thus, for example, at page 35 of the brief (FW 20) evidence as to what petitioner Stack was allegedly taught in Moscow in 1932 is referred to as proof of the conspiracy, although the evidence was admitted only on the issue of that petitioner's intent or knowledge (Supp. App. Item 2, p. 4). The same use of limited testimony was made with respect to the 1934 waterfront strike testimony (p. 38 including footnote 21) which was offered by the prosecution and received as against Schneiderman only (Supp. App. Item 3, p. 5).

(m) The respondent's process of tarring every idea expressed by the Communist Party with an evil motive is well illustrated by its treatment of outline references to the "American Revolution of 1776, French Revolu-

tion, Russian Revolution in 1917" (p. 40). The respondent's position is that because force and violence was involved in all of these revolutions, it must be inferred that by discussing them, the Communist Party was thereby advocating a violent revolution to achieve socialism—even though democratic processes through which the majority could achieve their wishes are available. Certainly a substantial question is raised as to the invasion of First Amendment rights by a theory which renders discussion of the American Revolution dangerous. At the same time the respondent points to quotations from the Declaration of Independence and from Lincoln and Jefferson regarding the "right of revolution" (converted by the Government to the "right of violent revolution") as further evidence of the conspiracy. When the Government takes such a position it is not difficult to explain the fear of American citizens to reaffirm the Declaration of Independence.

In summation, the repeated assertions that petitioners jointly and collectively directed the California Party, its classes and study groups and other activities is in no way supported by the record. Evidence of any joint action among *all* of the petitioners is completely lacking; evidence of joint action among *any* of the petitioners is almost totally absent, and where present involves a few of the petitioners in each instance, the group changing from occasion to occasion, and relates to activity unconnected with the forbidden advocacy. The "overt acts" alleged and proved are examples of this; they involve several of the petitioners speaking at the same meeting on subjects fully within the protection of the First Amendment. As for schools and relationship to any outlines used in the schools there is not one word of evi-

dence involving petitioners Healey, Dobbs, Fox, Kusnitz, Lambert, Lima and Steinberg. As to the remaining four petitioners here, the evidence establishes no joint action at all among them and no individual action in any way indicating their agreement to utilize the schools or classes for the purpose of engaging in the outlawed advocacy.[16] As for the quotations from the books relied on by the Government, as to most petitioners there is no evidence that they ever read them let alone adopted them as applicable to the United States. Yet it is precisely out of the schools and quotations that the cloth of this conspiracy is fabricated by the Government.

The Government, in order to establish the claimed proof of guilt relies on quotations from books and third party declarations to establish every element of the offense, including each petitioners connection with the conspiracy charged and specific intent. Whether such proof may be substituted for proof of personal conduct is a question which the Government avoids but which this Court should decide.

5. Reply on the Question of "Overt Acts" (Pet. pp. 15-16, 76-78; Resp. Br. pp. 50-51).

Respondent does not discuss the failure of the trial court to instruct on the question of "overt acts" as requested by petitioners (Pet. Br. pp. 15-16), for the first time presenting to this Court the question of the construction of the "overt acts" provisions of the general conspiracy

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[16]In the *Dennis* case, it was admitted that "what is taught in our schools is determined" by the National Committee of which each defendant was a member. Here not only is such evidence lacking, but there is undisputed evidence showing that there was no such controls.

statute as applied to a Smith Act prosecution (Pet. Br. p. 76).

Respondent concedes that neither of the two "overt acts" upon which the prosecution solely relies "involved any advocacy or teaching of political violence" (Resp. Br. p. 50), but respondent avers that in a prosecution for conspiracy the overt act alleged and proved need not be itself a crime (Resp. Br. p. 51). Plainly, that is not the issue here. Where a charge is made that the accused conspired to advocate and teach the forcible overthrow of the Government and to use the Communist Party for such object, can the case be submitted to the jury when concededly the only proof of "overt acts" is attendance by the accused at a lawful public meeting held under the auspices of the Communist Party? Respondent has not addressed itself to this significant question (Pet. Br. pp. 76-8).

Respondent concedes that the overt act "must be pursuant to or in furtherance of the conspiracy," but it avers that "this condition was satisfied here by the leading roles played by Steinberg and Schneiderman at public meetings admittedly designed to strengthen the Communist Party" (Resp. Br. p. 51). By this statement, respondent reveals the vice of treating speech or assembly as the equivalent of overt acts of a seditious character. Petitioners were not charged here with a conspiracy "to strengthen the Communist Party". The trial court specifically instructed the jury that the indictment charged petitioners with conspiracy to organize the Party "as a means or vehicle to advocate and teach the necessity and the duty of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit." (106 F. Supp. 906,

935.) The overt acts charged did not in any manner relate to the use of the Communist Party for this purpose. Under the Constitution, under the decisions of this Court, and as a matter of law, the jury could not properly find that attendance at a lawful public meeting of the Communist Party was an act in furtherance of the conspiracy alleged on this indictment (Pet. Br. pp. 76-8). It is for this Court to decide whether the general conspiracy statute can constitutionally be used to turn speech and assembly into seditious conduct.

6. Reply on the Question of the F.B.I. Report and Motion for Mistrial (Pet. pp. 16-18, 79-83; Resp. Br. pp. 68-72.)

Respondent seeks to shift the onus of the publication of the Report from the Department of Justice to the Senate Committee (Resp. Br. p. 69). The facts show that the chairman of the committee requested the "documentary proof which I could cause to be published" on June 21, 1952 (App. Item 78, p. 302). On June 25, 1952, the Department responded stating that there "will be no objection to your committee issuing this compilation" (*supra*, pp. 302-3). It was known by the Department that the Report would be issued for "general distribution" (*supra*, pp. 302-3). No request was made by the Department that issuance of the Report be foregone until the conclusion of the trial. That such a highly sensational Report would receive extended publicity, considering its author and sponsorship, cannot be denied. That the publication of the Report was potentially harmful was conceded by the courts below (Pet. Br. p. 81).

The trial court stated: "There will be only one question" [R. 13714]. The compound question was whether

the jury had read the publicity and if they felt that they could not with an open mind decide the case solely on the evidence. "Then we take their word for it, whatever it is" [R. 13714]. Thus, the trial court was adamant against any searching interrogation. An answer of "yes" or "no" to the single compound question would have been meaningless. It is plain that it was not petitioners who were "fencing" (Resp. Br. p. 70). It should be noted that the trial court declined to give a specific instruction to disregard the publicity (Pet. Br. p. 18), and after verdict, the District Court ordered no interrogation of any juror, upon pain of contempt [R 14008].

Under the circumstances of the case herein (Pet. Br. pp. 16-18, 79-83), the publication of the Report was presumptively prejudicial, and the burden rested heavily upon the respondent to establish the harmlessness of its conduct. The courts below relieved respondent of this burden and even effectively foreclosed any attempt by petitioners to themselves assume the burden, if it was theirs. Respondent, in its citation of decisions, appears to have overlooked the recent decision of this Court in *Remmer v. United States*, 347 U. S. 227.

Contrary to respondent's belief, petitioners do not contend that "all of the organs of Government" were required to become silent during their trial (Resp. Br. p. 71). But when prosecuting officials issue a "long secret F.B.I. Report" for publication at the most crucial time in a criminal trial on some of the precise issues upon which the accused is being tried, and which cannot fail to obtain full publicity, then decent standards of procedure require not only a searching interrogation of the jurors by court and counsel, but a new trial unless the prosecution can establish overwhelmingly by proof that

no prejudice was done to the accused. "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. ~~308~~ 6

OLETA O'CONNOR YATES, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE RECORD ON APPEAL WITHOUT PRINTING PORTIONS OF SAID RECORD.

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Respondent.

MOTION FOR LEAVE TO FILE RECORD ON APPEAL WITHOUT PRINTING PORTIONS OF SAID RECORD.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the United States Supreme Court:

The reporter's transcript in the above-entitled matter is more than 15,000 pages in length. The exhibits number more than 500 and most of them are voluminous, consisting in large part of books, mag-

azines, newspapers and similar publications. The United States Court of Appeals for the Ninth Circuit, pursuant to its order, heard the case on a record consisting of photo offset copies of those portions of the reporter's transcript setting forth all of the evidence in the trial court, a single typewritten copy of the clerk's transcript in the court below, printed appendices filed separately by the parties setting forth that portion of the evidence which the parties desired particularly to direct to the attention of the court, and the original exhibits.

The printing of the entire record in this Court would be very expensive and impose a great burden upon the petitioners. It is practical to file a record composed of the record in the court below and other items which will be reasonably suitable for this Court's needs in hearing the case.

For these reasons petitioners move for permission to file a record consisting of the following items:

1. Ten copies, in addition to the single copy now on file, prepared by a photo offset process, of all portions of the reporter's transcript containing the evidence submitted in the trial court, said copies to be corrected on their face in accordance with the order of the trial court, and the stricken portions of said record to be indicated on each copy; petitioners propose to bind the said record in stiff covers with several volumes of the reporter's transcript to be included in each bound volume.

2. Designated portions of the clerk's transcript to be printed pursuant to the rules of this Court, in-

cluding therein all of the proceedings had in the United States Court of Appeals and the opinion of the court below.

3. One copy of the printed appendices filed in the court below, in addition to the ten copies already on file in this Court.

4. The original exhibits.

Wherefore, petitioners pray that an order permitting the filing of the record as hereinabove described be entered herein.

Dated, San Francisco, California,
October 26, 1955.

Respectfully submitted,

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Statutes involved 2

Questions presented 3

Statement of the case 6

Introduction 6

The indictments 7

Oleta O'Connor Yates 13

1. Petitioner's reasons for joining the Communist Party .. 13

2. Petitioner's understanding of the general program of the Party and the general principles of Marxism-Leninism 16

3. Petitioner's understanding of the revolutionary change from capitalism to socialism 22

4. Petitioner's understanding of the application of general principles of Marxism-Leninism to specific times, places and conditions 26

5. The evidence of petitioner's activities 30

Henry Steinberg 48

Frank Carlson 51

Dorothy Healey Connelly 58

Ben Dobbs 62

Ernest Otto Fox 67

Rose Chernin Kusnitz 69

Carl Rude Lambert 72

PAGE

Albert Jason Lima 77

Frank Efroim Spector 79

Loretta Starvus Stack 85

Respondent's theory—the inferences predicated upon respondent's construction of the doctrines of Marxism-Leninism 91

Nature and character of respondent's witnesses as related to "solidity" of evidence and to requested instruction regarding consideration of informers' testimony 100

Allegation of overt acts in the indictment and the proof thereof 105

The Philbrick articles—the F.B.I. report—unfair trial 106

Instructions and refusals to instruct 112

Summary of argument 116

Argument 124

I.

The evidence is insufficient to support the verdicts 124

The scope of review 124

A. The evidence does not establish the connection of any petitioner with the conspiracy charged 127

B. Membership and innocent party activities—the only substantial evidence against any petitioner—respondent's theory 145

1. Respondent's abstract theory of guilt 146

2. The inferences drawn by respondent as to the understanding and interpretation of Marxist writings, imputed to petitioners without evidence, are untenable in fact and in logic 148

3. Respondent's own direct evidence refutes its "inference" theory 154

PAGE

4. The legal precedents are overwhelmingly opposed to respondent's theory of pyramided inferences....154

C. Membership and officership in the Communist Party, together with lawful activities therein, leads to no inference of criminality—Section 4(f) of the McCarran Act and respondent's reliance upon guilt by association 159

D. The evidence does not establish the conspiracy charged 166

E. The evidence does not establish the requisite specific intent of any petitioner.....176

F. The evidence does not establish the power of any petitioner individually or as a member of any group to bring about the evil at which the statute is aimed..184

Summation 186

II.

The evidence is insufficient to establish that the "overt acts" alleged and proved were in furtherance of the conspiracy charged in the indictment and to effect the objects thereof....187

III.

The exclusion of the issue of incitement to action from the case by the courts below resulted in an unconstitutional construction and application of the Smith Act.....216

A. The treatment of the issue of "incitement to action" by the courts below.....217

B. The treatment of the question of "incitement to action" in Dennis 220

C. The legal and historical roots of First Amendment rights to full and free discussion and advocacy contrasted with utterances which incite to unlawful action....228

PAGE

D. The construction of the Smith Act by the courts below—instructions to the jury 241

E. The validity of the Smith Act as construed by the courts below 251

IV.

The refusal of the trial court either to itself rule on the issue of "clear and present danger" or to instruct the jury with respect to the pertinent jury questions relating thereto, together with the trial court's equation of "clear and present danger" with the alleged agreement to advocate plus the alleged individual "intent," resulted in an unconstitutional application of the statute to these petitioners; and the trial court should have directed an acquittal of the petitioners because of the absence of any basis for a finding of clear and present danger 259

V.

The construction of the word "organize" by the courts below was contrary to law and the Constitution 274

VI.

Refusals to grant motions for mistrial upon publication of the "F.B.I. report," and to grant motions for continuance upon publication of "the Philbrick story," deprived petitioners of a fair and impartial trial and their liberties without due process of law 289

Conclusion 299

Appendix. Statutes and constitutional provisions involved ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abrams v. United States, 250 U. S. 616	177, 226, 234, 252
Allen v. Trust Co. of Georgia, 149 F. 2d 120; aff'd, 326 U. S. 630	157
American Communications Association v. Douds, 339 U. S. 382	213, 238, 246, 253, 268
Annett v. United States, 205 F. 2d 689	183
Bannon v. United States, 156 U. S. 464	199, 200
Bartlett v. United States, 166 F. 2d 920	166
Baumgartner v. United States, 322 U. S. 665	126, 131, 140, 155, 164, 180, 183, 214
Beauharnais v. Illinois, 343 U. S. 250	238
Bechtel v. United States, 176 F. 2d 741	183
Berger v. United States, 295 U. S. 78	293
Bergmann v. United States, 144 F. 2d 34	183
Bollenbach v. United States, 326 U. S. 607	248, 249
Boyd v. United States, 116 U. S. 616	180, 215
Boyd v. United States, 142 U. S. 450	156, 180
Boyer v. United States, 132 F. 2d 12	180, 293
Brady v. United States, 24 F. 2d 399	156
Braverman v. United States, 317 U. S. 49	189, 201
Bridges v. United States, 184 F. 2d 881	210
Bridges v. United States, 346 U. S. 209	188
Bridges v. Wixon, 326 U. S. 135	163
Brown v. Maryland Casualty Co., 55 F. 2d 159	157
Brune v. Fraidin, 149 F. 2d 325	135
Bryan v. United States, 175 F. 2d 223; aff'd, 338 U. S. 552	155
Burstyn, Inc. v. Wilson, 343 U. S. 495	164, 287
Butler v. United States, 197 F. 2d 561	164
Caldwell v. United States, 139 F. 2d 121	179
Cantwell v. Connecticut, 310 U. S. 296	164, 165, 237, 253, 268
Carlson v. California, 310 U. S. 106	287
Chambers v. Florida, 309 U. S. 227	124
Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210	176

PAGE

Chaplinsky v. New Hampshire, 315 U. S. 568 237
Cliffs Corp. v. United States, 103 F. 2d 77 281
Clyatt v. United States, 197 U. S. 207 156
C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472 157
Commonwealth v. Mann Co., 150 Pa. 64, 24 Atl. 601 282
Communist Party v. Subversive Activities Central Board, ... U. S. ....., 1006 Ed. Adv. Op. 554 130
Cramer v. United States, 325 U. S. 1 ..... 188, 191, 192, 288
Cratty v. United States, 163 F. 2d 844 130
Cronin's Estate v. Commissioner of Internal Revenue, 164 F. 2d 561 157
Crowley v. United States, 8 F. 2d 118 180
Cunard SS Co. v. Kelley, 126 Fed. 610 157
Curley v. United States, 160 F. 2d 229; cert. den., 331 U. S. 837 155
Dahly v. United States, 50 F. 2d 37 ..... 155, 202
Davidson v. United States, 61 F. 2d 250 168
Debs v. United States, 249 U. S. 211 234
DeJonge v. Oregon, 299 U. S. 353 ..... 120, 121, 155, 164, 166, 213, 214, 215, 232, 239, 257
Delaney v. United States, 199 F. 2d 107 ..... 293, 297
DeLuca v. United States, 299 Fed. 741 202
Dennert v. United States, 147 F. 2d 286 155
Dennis v. United States, 341 U. S. 494 ..... 8, 10, 12, 36, 66, 91, 121, 122, 123, 124, 125, 153, 154, 159, 160, 170, 171, 175, 176, 177, 184, 185, 209, 217, 218, 219, 220, 223, 227, 229, 234, 238, 244, 250, 256, 258, 265, 268, 271, 273, 274, 276, 277, 279
Dickerson v. United States, 18 F. 2d 887 168
Dickins v. International Brotherhood, etc., 171 F. 2d 21 132
Direct Sales Co. v. United States, 319 U. S. 703 158
District of Columbia v. Clawans, 300 U. S. 617 ..... 129, 130
Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co., 112 F. 2d 302; reversed, 312 U. S. 410 157
Fasulo v. United States, 7 U. S. 620 285

PAGE

Feiner v. New York, 340 U. S. 315 238
Fisher v. United States, 231 F. 2d 99 130
Fiske v. Kansas, 274 U. S. 380 ..... 125, 133, 213
Fiswick v. United States, 329 U. S. 211 288
Fletcher v. United States, 158 F. 2d 321 ..... 129, 130
Flood v. United States, 36 F. 2d 444 180
Flynn v. United States, 216 F. 2d 354 ..... 251, 277, 278
Fox v. Washington, 236 U. S. 273 ..... 233, 243
Frankfeld v. United States, 198 F. 2d 679 ..... 251, 277
Frohwerk v. United States, 249 U. S. 204 234
Fulbright v. United States, 91 F. 2d 210 179
Gargotta v. United States, 77 F. 2d 977 158
Gart v. United States, 294 Fed. 66 156
Gas Service Co. v. Hunt, 183 F. 2d 417 157
Gebardi v. United States, 287 U. S. 112 198
General Reinsurance Corp. v. Southern Surety Co., 27 F. 2d 265 156
George v. Missouri P. R. Co., 213 Mo. App. 668 154
Gitlow v. New York, 268 U. S. 652 ..... 221, 235, 240, 243, 244
Gold v. United States, 36 F. 2d 16 156
Gonzales v. United States, No. 111, 24 L. W. 3164 214
Goodman v. United States, 128 F. 2d 854 179
Grau v. United States, 287 U. S. 124 156
Griffin v. United States, 295 Fed. 437 294
Grosjean v. American Press Co., 297 U. S. 233 229
Hague v. C. I. O., 307 U. S. 496 211
Hall v. United States, 256 Fed. 748 ..... 180, 183
Harrison v. United States, 7 F. 2d 259 208
Hartzel v. United States, 322 U. S. 687 ..... 126, 133, 155, 164, 176, 181, 183, 213, 266
Haupt v. United States, 330 U. S. 631 188
Herndon v. Lowry, 301 U. S. 242 ..... 126, 133, 155, 164, 166, 176, 213, 214, 215, 237, 267, 287
Hyde v. United States, 225 U. S. 347 200
James v. Appel, 192 U. S. 129 281

PAGE

Johns v. United States, 195 F. 2d 77 156
Joines v. Patterson, 274 U. S. 544 281
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 238
Jones v. Liberty Glass Co., 332 U. S. 524 281
Joplin Mercantile Co. v. United States, 236 U. S. 531 201
J. W. Ringrose Co. v. W. & J. Sloane, 266 Fed. 402 156
Kammann v. United States, 259 Fed. 192 ..... 140, 180
Karn v. United States, 158 F. 2d 568 155
Keegan v. United States, 325 U. S. 478 ..... 132, 134, 164, 166, 171, 179, 183
Kirsch v. United States, 174 F. 2d 595 293
Klapprott v. United States, 335 U. S. 601 ..... 126, 164, 214
Knauer v. United States, 328 U. S. 654 ..... 140, 161
Kotteakos v. United States, 328 U. S. 750 ..... 163, 288
Kraus & Bros. v. United States, 327 U. S. 614 249
Krulewitch v. United States, 336 U. S. 440 ..... 197, 208, 215, 224, 298
Kuhn v. United States, 26 F. 2d 463 ..... 127, 179
Lambert v. People, 9 Cowen 578 199
Langer v. United States, 76 F. 2d 817 ..... 159, 181
Lauf v. E. G. Shinner & Co., 303 U. S. 323 270
Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 175
Lee v. United States, 106 F. 2d 906 179
Lehmann v. Acheson, 206 F. 2d 592 183
Lempie v. United States, 39 F. 2d 19 155
Lincoln National Life Ins. Co. v. Erickson, 42 F. 2d 997 157
Linde v. United States, 13 F. 2d 59 168
Lindstrom v. Commissioner, 149 F. 2d 344 281
Liverpool & London & Globe Insurance Co. v. Nebraska Storage Warehouses, 96 F. 2d 30 135
Lonabaugh v. United States, 179 Fed. 476 201
Looney v. Metropolitan R. R. Co., 200 U. S. 480 156
Lovell v. Griffin, 303 U. S. 444 229
Lubriko v. Wyman, 290 Fed. 12 131

PAGE

Maggio v. Zeitz, 333 U. S. 56 135
Manning v. Insurance Co., 100 U. S. 693 156
Marin v. Ellis, 15 F. 2d 321 135
Marsh v. Alabama, 326 U. S. 501 241
Maryland v. Baltimore Radio Show, 338 U. S. 912 293
Maryland & Virginia Milk Producers Assn. v. United States, 193 F. 2d 907 154
Masses Pub. Co. v. Patten, 244 Fed. 535 233
Mattox v. United States, 146 U. S. 140 294
May v. United States, 175 F. 2d 994 127
Mayola v. United States, 71 F. 2d 65 127
Mazurosky v. United States, 100 F. 2d 958 179
Meyer v. Cadwalader, 49 Fed. 32 ..... 292, 293
Meyer v. United States, 141 F. 2d 825 183
Mitchell v. United States, 88 U. S. 350 163
Moore v. Dempsey, 261 U. S. 86 293
Morrison v. California, 291 U. S. 82 168
Mortensen v. United States, 322 U. S. 369 124
Murdock v. Pennsylvania, 319 U. S. 105 ..... 165, 237
Musser v. Utah, 333 U. S. 95 ..... 176, 237, 286
Muyres v. United States, 89 F. 2d 784 179
National Labor Relations Board v. Highland Park Mfg. Co., 341 U. S. 322 283
National Paper Trade Ass'n (3 C. C. H. Trade Reg. R. Par. 25,194, Sept. 25, 1954) 174
Near v. Minnesota, 283 U. S. 697 229
Northwest Pac. R. R. Co. v. Bobo, 290 U. S. 499 155
Norton v. United States, 92 F. 2d 753 156
Orth v. United States, 142 F. 2d 969 183
Parks v. Ross, 11 How. (U. S.) 361 196
Pennekamp v. Florida, 328 U. S. 331 ..... 126, 165, 242
Pennsylvania v. Nelson, ... U. S. ....., 100 L. Ed. (Adv. Op.) 415 239
Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333 154

PAGE

People v. Thornton, 63 Cal. App. 724, 219 Pac. 1020 ..... 279, 280, 282
People v. Thurman, 62 Cal. App. 147, 216 Pac. 394 ..... 280, 281
People v. Ware, 67 Cal. App. 81, 226 Pac. 956 280
Pettibone v. United States, 148 U. S. 197 199
Pierce v. United States, 252 U. S. 239 ..... 226, 234, 266, 267
Pinkerton v. United States, 328 U. S. 640 168
Pulver v. Union Inv. Co., 270 Fed. 699 131
Radin, M., Intent Criminal, VIII Cyc. Soc. Sci. p. 127 190
Railroad Co. v. Houston, 95 U. S. 697 155
Remmer v. United States, 347 U. S. 227 ..... 294, 295
Reynolds v. United States, 98 U. S. 145 232
Rivera v. United States, 57 F. 2d 816 132
Roseman v. United States, 323 U. S. 658 281
Rosenberg v. United States, 120 F. 2d 935 157
Rossi v. United States, 49 F. 2d 1 ..... 156, 180
Ryan v. United States, 191 F. 2d 779 296
Schaefer v. United States, 251 U. S. 466 ..... 193, 226, 235, 271
Schneiderman v. United States, 320 U. S. 118 ..... 27, 29, 41, 42, 103, 139, 140, 152, 155, 164, 179, 213, 214, 215
Schenck v. United States, 249 U. S. 47 ..... 233, 234, 265
Screws v. United States, 325 U. S. 91 176
Shepard v. United States, 290 U. S. 96 131
Shepherd v. Florida, 341 U. S. 50 ..... 293, 297
Sigurdson v. Tanden, 215 F. 2d 791 130
Simon v. United States, 78 F. 2d 454 156
Smith v. Cahoon, 283 U. S. 553 176
Southern Railway Co. v. Stewart, 115 F. 2d 317, Mod. 119 F. 2d 85 156
Spector v. United States, 192 F. 2d 1002 9
Stack v. Boyle, 192 F. 2d 56 9
Stack v. Boyle, 342 U. S. 1 ..... 9, 10, 124, 127, 163
Stack v. United States, 192 F. 2d 75 9

PAGE

State ex rel. Childs v. School District, 54 Minn. 213, 55 N. W. 1122 282
St. Paul Fire and Marine Insurance Co. v. Bachmann, 285 U. S. 112 248
Stromberg v. California, 283 U. S. 359 ..... 188, 236, 287, 288
Sugarman v. United States, 35 F. 2d 663 127
Superior Engraving Co. v. National Labor Relations Board, 183 F. 2d 783 177
Taylor v. Mississippi, 319 U. S. 583 ..... 164, 213
Terminiello v. City of Chicago, 337 U. S. 1 ..... 165, 248
The Folmina, 212 U. S. 354 155
Thomas v. Collins, 323 U. S. 516 ..... 165, 212, 237, 243
Thornhill v. Alabama, 310 U. S. 88 286
Tillinghast v. Richards, 225 Fed. 226 202
Tingle v. United States, 38 F. 2d 573 179
Travelers Ins. Co. v. Warrick, 172 F. 2d 516 157
Tucker et al. v. Traylor Engineering & Mfg. Co., 48 F. 2d 783 157
United Brotherhood v. United States, 330 U. S. 395 248
United States v. Andolschek, 142 F. 2d 503 168
United States v. Ault, 263 Fed. 800 ..... 197, 201
United States v. Ausmeier, 152 F. 2d 349 250
United States v. Bretling, 61 U. S. 252 155
United States v. Britton, 108 U. S. 199 ..... 199, 201
United States v. Cardiff, 344 U. S. 174 286
United States v. C. I. O., 335 U. S. 106 287
United States v. Crimmins, 123 F. 2d 271 168
United States v. Cruikshank, 92 U. S. 542 211
United States v. Di Re, 332 U. S. 581 ..... 152, 179
United States v. Falcone, 109 F. 2d 579 ..... 175, 179, 208
United States v. Food and Grocery Bureau of So. Calif., 43 Fed Supp. 966 ..... 127, 163, 177
United States v. Gardner, 171 F. 2d 753 ..... 179, 206
United States v. Goldberg, 25 Fed. Cas. 1342 (No. 15,223) 199
United States v. Gradwell, 243 U. S. 476 198
United States v. Haim, 114 F. 2d 566 179

PAGE

United States v. Halseth, 342 U. S. 277 284
United States v. Hauck, 155 F. 2d 141 183
United States v. Hudson, 7 Cranch 32 224
United States v. L. Cohen Grocery Co., 255 U. S. 81 176
United States v. Lustig, 16 F. R. D. 378 136
United States v. Marine, 84 Fed. Supp. 785 293
United States v. McLaughlin, 169 Fed. 302 202
United States v. Mesarosh, 223 F. 2d 449 ..... 248, 252, 278
United States v. Morgan, 118 Fed. Supp. 621 168
United States v. National Ass'n of Real Estate Boards, 339 U. S. 485 155
United States v. Offutt, 127 F. 2d 336 202
United States v. Penn, 131 F. 2d 1021 179
United States v. Rakes, 74 Fed. Supp. 645 296
United States v. Reginelli, 133 F. 2d 595 157
United States v. Renee Ice Cream Co., 160 F. 2d 353 155
United States v. Resnick, 299 U. S. 207 284
United States v. Rosenberg, 200 F. 2d 666 293
United States v. Ross, 92 U. S. 281 132
United States v. Russo, 123 F. 2d 420 158
United States v. Schneiderman, 102 Fed. Supp. 87 ..... 9, 10, 20, 23, 27
United States v. Schneiderman, et al., 106 Fed. Supp. 906 ..... 111, 114
United States v. Schneiderman, 320 U. S. 118 ..... 27, 28, 110, 120, 126
United States v. Schwimmer, 279 U. S. 644 252
United States v. Spector, 102 Fed. Supp. 75 9
United States v. Tannuzzo, 174 F. 2d 177; cert. den., 338 U. S. 815 168
United States v. Temple, 105 U. S. 97 284
United States v. White, 323 U. S. 694 ..... 127, 176, 177
Vernon v. United States, 146 Fed. 121 157
Ward v. United States, 344 U. S. 924; reversed, 195 F. 2d 441 183

PAGE

Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490 282
Weniger v. United States, 47 F. 2d 692 179
Wesson v. United States, 172 F. 2d 931 152
Westland Oil Co. v. Firestone Tire & Rubber Co., 143 F. 2d 326 156
West Virginia v. Barnette, 319 U. S. 624 ..... 124, 165
Wheaton v. United States, 133 F. 2d 522 294
Whitmire v. Cass, 213 S. C. 230, 49 S. E. 2d 1 282
Whitney v. California, 274 U. S. 357 236
Wieman v. Updegraff, 344 U. S. 183 ..... 164, 205, 253
Williams v. North Carolina, 317 U. S. 287 ..... 188, 288
Willis v. Eastern Trust & Banking Co., 169 U. S. 295 280
Wilson v. United States, 109 F. 2d 895 167
Winters v. New York, 333 U. S. 507 ..... 176, 238, 287
Wolcher v. United States, 200 F. 2d 493 ..... 156, 180
Wolf v. United States, 259 Fed. 388 ..... 181, 183
Yusem v. United States, 8 F. 2d 6 156

DICTIONARIES

Black's Law Dictionary (3rd Ed., 1944) 283
Oxford English Dictionary (1933) 245
Shorter Oxford English Dictionary (1933) 245
Webster's New International Dictionary 201
Webster's New International Dictionary (2d Ed.) 282

MISCELLANEOUS

Federalist, No. XLVII 228
New York Times, July 8, 1954 129
96 Congressional Record, p. 13739 161
96 Congressional Record, p. 13761 161
96 Congressional Record, p. 14257 162
96 Congressional Record, pp. 14491, 14500 161

REPORTS PAGE

Senate Report No. 1358 (to accompany S. 2311), 81st Cong., 2d Sess. 160, 161, 162
Senate Report No. 2369 (to accompany S. 4037), 81st Cong., 2d Sess. 160, 161

STATUTES

Act of March 2, 1867, 39th Cong., 2d Sess., Chap. 169 198
Act of September 23, 1950, Chap. 1024 160
Deering's General Laws, Act 8428, Sec. 2(4) 279
McCarran Act, Sec. 4(f) 119, 159, 160, 161
Internal Security Act of 1950, Title I, Sec. 1(a) 160
Revised Statutes, Sec. 5440 198
Smith Act (June 28, 1940), Chap. 439, Title I, Sec. 5 276
Smith Act, Sec. 2 ..... 8, 276
Smith Act, Sec. 3 ..... 8, 276
14 Statutes at Large, Sec. 30, p. 484 198
54 Statutes at Large, p. 670 276
54 Statutes at Large, p. 671 ..... 8, 276
54 Statutes at Large, Title I, Sec. 2(b), p. 670 279
64 Statutes at Large, p. 987 160
64 Statutes at Large, Act of Sept. 23, 1950, Chap. 1024, Title I, Sec. 4, p. 991 205
2 Statutes of Treason (1600); pp. 1333, 1335 192
United States Code Annotated, Title 50, Sec. 781 160
United States Code, Title 5, Sec. 291 289
United States Code, Title 5, Sec. 300 289
United States Code, Title 5, Sec. 340 289
United States Code, Title 18, Sec. 371 ..... 2, 3, 4, 187, 188, 201, 209, 224
United States Code, Title 18, Sec. 2384 187
United States Code, Title 18, Sec. 2385 ..... 2, 3, 4, 5, 8, 187
United States Code Title 18, Sec. 2385, par. 3 ..... 279, 285
United States Code, Title 18, Sec. 3052 289
United States Code, Title 18, Sec. 3107 289

PAGE

United States Code, Title 28, Sec. 507 289
United States Code, Title 28, Sec. 1254(1) 2
United States Code, Title 50, Sec. 782(f) 2, 3, 160, 205
United States Code (1946 Ed.), Title 18, Sec. 10 8
United States Code (1946 Ed.), Title 18, Sec. 11 ..... 2, 8
United States Constitution, First Amendment .....
.....2, 3, 4, 5, 123, 124, 125, 126, 137, 152, 157, 165, 176, 185, 217, 222, 223, 225, 227, 229, 230, 231, 232, 234, 237, 238, 240, 264, 266, 269, 272, 273, 286
United States Constitution, Fifth Amendment 2, 3, 4, 5, 160
United States Constitution, Sixth Amendment 2, 5

TEXTBOOKS

50 American Jurisprudence, Sec. 409, p. 433 284
53 American Jurisprudence, Sec. 545, p. 434 249
4 Barron, Federal Practice and Procedure (Rules Ed.), p. 480 293
18 Brooklyn Law Review (1952), p. 263 199
43 California Law Review (1955), Lasky, The Long Bow or Lucretius, Book IV, line 817, p. 596 208
Chefee (1920), Freedom of Speech, pp. 22-23 230
Chafee (1920), Free Speech, pp. 25-30 256
Chafee (1920), Freedom of Speech, p. 31 228
Chafee (1920), Freedom of Speech, p. 119 212
Chafee (1941), Freedom of Speech, pp. 187-188 256
Chafee (1941), Free Speech in the United States, p. 8 153
Chafee (1941), Free Speech in the United States, pp. 57-60, 186 266
Chafee (1941), Free Speech in the United States, pp. 143, 163, 165 279
Chafee (1941), Free Speech in the United States, pp. 172-173, 186, 396 193
Chafee (1941), Free Speech in the United States, pp. 277-280 130
Chafee (1941) Freedom of Speech, pp. 466-467 254
Clough, (1955), Our Long Heritage, pp. 2, 179 228

PAGE

Coke, Inst. III, p. 5 190
Comm. (Jones Ed., 1916), Book IV, Chap. 27, Sec. 403, p. 2596 187
37 Congressional Globe (1920), 39th Cong., 2d Sess., Sen. Feb. 28, 1867 798
31 Corpus Juris Secundum, Sec. 268, p. 1019 133
p. 575 256
82 Corpus Juris Secundum, Sec. 329(b), pp. 629, 649 281
2 Elliott's Debates in the State Conventions on the Federal Constitution (2d Ed., 1907), pp. 93, 432, 435, 449, 453, 455, 469, 488, 552 231
3 Elliott's Debates in the State Conventions on the Federal Constitution (2d Ed., 1907), pp. 203, 218, 441, 443-451, 461, 469, 588, 610, 620, 626 231
4 Elliott's Debates (2d Ed.), Report on Virginia Resolutions p. 575 ..... 153, 156
4 Elliott's Debates in the State Conventions on the Federal Constitution (2d Ed., 1907), pp. 137-153, 161-166, 209-210, 314-315, 337 231
4 Elliott (1907 Ed.), Debates in the State Conventions on the Federal Constitution 228
6 Encyclopedia of Social Science (1931), p. 455 229
1 Erskin, Defense of Paine (Wheeler Ed., 1908), p. 147 240
3 Kenny (25 Ed.), p. 316 190
Kenny (15th Ed., Camb. 1936), Outlines of Criminal Law, p. 40 190
32 Harvard Law Review (1919), Chafee, Freedom of Speech in War Time, pp. 932, 967 267
35 Harvard Law Review (1922), Sayre, F. B., Criminal Conspiracy, p. 393 198
44 Harvard Law Review (1931), pp. 682, 688 232
58 Harvard Law Review (1945), Treason in the United States, pp. 226, 815 255
58 Harvard Law Review (1945), pp. 395, 417-444 193

PAGE

61 Harvard Law Review (1948), O'Brien, Loyalty Tests and Guilt by Association, p. 592 210
62 Harvard Law Review (1948), The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants, p. 276 210
63 Harvard Law Review (1950), Nathanson, N. L., The Communist Trial and the Clear and Present Danger Test, p. 1167 269
63 Harvard Law Review (1950), Controlling Press and Radio Influence in Trials, p. 840 ..... 293, 298
63 Harvard Law Review (1950), Controlling Press and Radio Influence on Trials, pp. 841-842 298
8 History of English Law (2d Ed.), p. 338 230
Holmes, The Common Law, p. 56 177
Holmes (1881), The Common Law, p. 68 267
Hurst, Treason in the United States 193
27 Johns Hopkins University Studies in Historical and Political Science (1909), Bryan, J. W., The Development of the English Law of Conspiracy 198
Landis, J. M., Freedom of Speech and of the Press 229
1 Macauley (N. Y. 1879), Critical and Miscellaneous Essays, p. 195 207
34 Marquette Law Review (1950), Judicial Delimitation of the First Amendment Freedoms, p. 57 269
2 May (1880), Constitutional History of England, p. 157 190
2 May (1880), Constitutional History of England, p. 213 240
48 Michigan Law Review (1950), The Rule of Clear and Present Danger: Scope of Its Applicability, p. 811 269
Miller (1951), Crisis in Freedom, p. 137 256
1 Montesquieu, (1873 Ed.), Spirit of Laws, Book XII, Chap. XI, p. 221 255
25 Notre Dame Law Review (1950), Antieu, C. J., Clear and Present Danger—Its Meaning and Significance, p. 603 269
Ploscowe, M., Treason in XV Cyc. Soc. Sci., p. 95 ..... 191, 192
2 Pollock and Maitland (2d Ed., 1909), History of English Law, p. 474 190

PAGE

21 Statute of Treason, p. 590 192
2 Stephens (1883 Ed.), History of the Criminal Law of England, p. 299 229
2 Stephen (1883), History of the Criminal Law of England, p. 377 210
Sutherland, Statutes and Statutory Construction (3rd Ed., 1943), Sec. 5604 284
Sutherland, Statutes and Statutory Construction (3rd Ed., 1943), Sec. 5605 284
1 The Spirit of Laws (1873 Ed.), Book XII, Chap. XII, p. 223 229
13 University of Detroit Law Journal (1950), Antieu, C. J., The Rule of Clear and Present Danger—Its Origin and Application, p. 198 ..... 267, 269
89 University of Pennsylvania Law Review (1941), Harno, A. J., Intent in Criminal Conspiracy, p. 624 198
23 Virginia Law Review (1937), Cousins, Agreement as an Element in Conspiracy, pp. 898, 911 168
38 Virginia Law Review (1952), Boudin L., Seditious Doctrines and the Clear and Present Danger Rule, pp. 143, 315 ..... 209, 269
Walter Lippman (1951), The Indispensable Opposition in Commanger, Living Ideas in America, p. 402 257
27 Washington University Law Quarterly (1942), Green, J. R., Liberty Under the Fourteenth Amendment, pp. 497, 539-540 267
1 Wheeler (1908 Ed.), Writings of Thomas Paine, p. 49 153
2 Wigmore, Evidence (3rd Ed.), p. 106 204
7 Wigmore, Evidence (3rd Ed.), Sec. 2094, pp. 467-469 131
Wiley Rutledge (1947), a Declaration of Legal Faith, p. 7 246
Winfield, P. H. (Camb. 1921), The History of Conspiracy and Abuse of Legal Procedure 198
2 Works, pp. 440-441 232
9 Works, The First Inaugural Address, March 4, 1801, p. 195 240
12 Works, p. 138 231

IN THE

Supreme Court of the United States

October Term, 1956.

No. 6.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Court of Appeals [Clk. R. 105] is reported at 225 F. 2d 146. The written opinions of the District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 731; 106 F. Supp. 892; 106 F. Supp. 906. These opinions are contained in the Appendix herein (Cert. App. B, pp. 48-145).[1]

[1]The reference Cert. App. is to the "Appendices to Petitions for Writs of Certiorari" which are bound together in a single volume with the pages numbered consecutively; Appendix B, for example, appears at pages 48-145 of said volume of Appendices. The clerk's

Jurisdiction.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. The time of petitioners to file petition for rehearing was by order of the Court of Appeals extended to May 16, 1955. A petition for rehearing was duly filed on May 13, 1955, and an order made and entered on June 15, 1955, denying the said petition for rehearing [Clk. R. 140]. On the 27th day of June, 1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955, by order of Mr. Justice Frankfurter. The petition for certiorari was granted on October 17, 1955 [Clk. R. 141]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Statutes Involved.

The pertinent provisions of the statutes involved: 18 U. S. C. (1946 Ed.), Sections 10, 11; 18 U. S. C. (1948 Ed.), Sections 371, 2385; 50 U. S. C., Section 783(f); and the constitutional provisions involved: First, Fifth and Sixth Amendments, are set forth in the Appendix to the brief herein.

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transcript printed herein will be referred to as "Clk. R."; the Reporter's transcript as "R."; the printed "Appendix to Appellee's Brief" as "GA"; and the "Appendix to Appellants' Brief" as "App. Item." The last mentioned Appendix is made up of numbered items, and the number of the item referred to as well as the pages of the appendix at which it is found will be indicated in each instance. The original exhibits on file here will be referred to as "Ex." Both the "Appendix to Appellee's Brief," "GA" and the "Appendix to Appellants' Brief," "App. Item" contain selected portions of the Reporter's transcript and Exhibits. In each instance, the Reporter's transcript reference and the exhibit number of the material incorporated in the appendix precedes the appendix reference. However, in most instances the reference to the original source will be more extended and comprehensive than the portion thereof included in the appendix. The appendices were submitted by the parties below as setting forth the parts of the record which the parties specially desired to direct to the attention of the Court of Appeals.

Questions Presented.

1. Whether the holdings of the courts below—that the evidence as to each of the petitioners and the nature of his activities were sufficient to establish the conspiracy alleged in the indictment, his connection with the conspiracy, his specific intent to forcibly overthrow the Government as speedily as circumstances permit and his power to bring about an attempt at such overthrow, and to sustain the conviction—were contrary to law and violated the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

2. Whether the holdings of the courts below—that proof of the advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein were sufficient to sustain a conviction under the instant indictment—established standards of proof contrary to law, including the provisions of 50 U. S. C., Section 783(f), the provisions of the First Amendment, and the due process provisions of the Fifth Amendment.

3. Whether the holdings of the courts below which permitted the jury to draw inferences of a criminal intent to further and effect the objects of the conspiracy alleged in the indictment solely from nonculpable speech, press and assembly, or from allegations of overt acts not supported by any evidence, were contrary to law and constituted an erroneous construction of the "overt acts" provisions of 18 U. S. C., Section 371 as applied with 18 U. S. C., Section 2385 to the prosecution of the instant indictment, and were in violation of the provisions of the

First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the refusal of the trial judge, sustained by the Court of Appeals, to give any instructions to the jury to the effect that the law punishes only advocacy and teaching of the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with intent that such teaching and advocacy be of a rule or principle of action resulted in an erroneous construction and application of 18 U. S. C., Sections 371 and 2385 and violation of the provisions of the First Amendment.

5. Whether the courts below erroneously applied 18 U. S. C., Sections 371 and 2385 to these petitioners in violation of the provisions of the First Amendment insofar as the clear and present danger rule is concerned by, separately or in their totality: refusing to submit the question of incitement to the jury for their determination; refusing any judicial evaluation at the trial of the evidence on the question of the nature of petitioners' activities or their power to bring about an attempt to forcibly overthrow the Government; and by equating clear and present danger solely with the intent, of an advocate or teacher of the proscribed doctrine, to forcibly overthrow the Government as speedily as circumstances would permit.

6. Whether the holding of the Court of Appeals sustaining the refusal of the trial judge to instruct the jury as requested by the petitioners that the testimony of wit-

nesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

7. Whether the construction of the word "organize" in 18 U. S. C., Section 2385 by the courts below to include "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization," and the application of the statute as construed to these petitioners, were contrary to law and in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

8. Whether the holding of the Court of Appeals sustaining the rulings of the trial judge in refusing to grant a continuance of the trial at its commencement upon the serialized publication of the "Philbrick Story" and in refusing to grant the motion for mistrial upon the publication of the "F. B. I. Report" at the eve of the submission of the case to the jury deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

Statement of the Case.

Introduction.

One of the most important issues in this proceeding is the sufficiency of the evidence to support the judgments of conviction. The trial was a lengthy one, made so by the use of the conspiracy weapon to encompass fourteen persons in one trial and by the theory of the prosecution. Respondent, for proof of petitioners' guilt, relied on a series of inferences to establish the conspiracy, petitioners' connection therewith, and the requisite specific criminal intent of each of the accused. Respondent's contention was that the Communist Party's advocacy and teaching of the "principles of Marxism-Leninism" was inferentially equivalent to the advocacy and teaching of the forcible overthrow of the Government which advocacy was imputable to petitioners by virtue of their membership and officership in the Party. The trial was thus inordinately burdened with readings from various portions of Marxist literature.

In order for this Court properly to appraise the evidence and to do justice both to the accused and the prosecution, petitioners set forth in the Appendices to the Petition for Certiorari all the evidence relating specifically to each petitioner upon which the prosecution itself relied as set forth in respondent's brief below [Cert. App. C, 146-83] and an analysis of said evidence in a chart [Cert. App. C, 188-99] which presented cryptically any evidence which purportedly established each petitioner's adherence to the doctrines of Marxism-Leninism or of revolution.

The Statement of the Case which follows, while perhaps longer than the usual one, actually is intended to expedite consideration by this Court of the entire case

affecting each of the petitioners, without omitting any essential aspect of the evidence. Petitioners' position is: that although the prosecution's view is that the "principles of Marxism-Leninism" demand the overthrow of the Government of the United States by force and violence, at least one tenable conclusion from the record in this case is that these concepts call for the winning of majority support in order to seek the achievement of revolutionary changes through peaceful means; that as to each of the accused there was no substantial evidence—in most cases not even a scintilla of evidence—to warrant a finding that he adopted a reprehensible interpretation of these principles or that he specifically intended to forcibly overthrow the Government as speedily as circumstances permit; that—unless a presumption of innocence is to be substituted for the presumption of guilt—the uncontradicted evidence is consistent only with a permissible and lawful interpretation by petitioners of these doctrines, and that the trial court erred in submitting the case to the jury rather than granting petitioners' motions for judgments of acquittal.

The Indictments.

Petitioners Dorothy Healey Connelly, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack and co-petitioners William Schneiderman, Philip Marshall Connelly and Al Richmond were arrested on a commissioner's warrant on July 26, 1951, and indicted on July 31, 1951.[2] It was charged that the

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[2]Also indicted at the same time was Mary Bernadette Doyle. However, she was severed from the case because of ill health on April 24, 1952 [R. 5885-7].

defendants named in the indictment conspired with each other and with "co-conspirators" (not named as defendants) William Z. Foster, Eugene Dennis and the other defendants in the *Dennis* case,[3] and with persons unknown to violate Section 2 of the Smith Act (54 Stat. 671, 18 U. S. C. (1946 Ed.) 10, and 18 U. S. C. (1948 Ed.) 2385) by conspiring "(1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence and (2) unlawfully, wilfully and knowingly to organize and help organize as the Communist Party of the United States of America, a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 Ed.) 11, and 18 U. S. C. (1948 Ed.) 371." It was further alleged that as part of said conspiracy the conspirators would become members, officers and functionaries of the Communist Party knowing its purposes; assume leadership therein and responsibility for carrying out its policies and activities; cause to be organized groups and various subdivisions of the Party in the State of California and elsewhere; engage in recruiting activities with concentration in the key basic industries and plants; participate in the publication and circulation of books, articles, magazines and newspapers teaching and advocating the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; cause to be written directives in various publications of the Communist Party including *Political Affairs* and the

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[3]See *Dennis v. United States*, 341 U. S. 494.

Daily People's World, teaching and advocating the necessity of overthrowing and destroying the Government of the United States by force and violence; "conduct and cause to be conducted schools and classes for indoctrination of recruits and members of said party in the principles of Marxism-Leninism in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances permit"; make and effect plans "to go underground in the event of emergency and from said underground position to continue in all respects the conspiracy"; use various methods including fraudulent passports and other false documents in order to conceal their identities and activities within the conspiracy. The indictment then alleged fifteen overt acts, the first of which is alleged to have occurred on July 17 and 18, 1948, and the last on July 24, 1951. Each of the overt acts consisted either of participation in a meeting or the issuance of a directive and its circulation in the Communist Party. In no instance was the content of the meeting or of the directive mentioned in the indictment [Clk. R. 1].

On August 31, 1951, petitioners Frank Efroim Spector, Ben Dobbs and Frank Carlson were arrested and on September 5, 1951, they were indicted on a charge identical with that alleged in the first indictment.[4]

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[4]Petitioners and their co-defendants were denied reasonable bail by the trial court. After 4½ months during which there were numerous proceedings in the trial court and the Court of Appeals and one case decided by this Court, the petitioners finally secured their release on bail. (*Stack v. Boyle,* 342 U. S. 1; *Stack v. Boyle,* 192 F. 2d 56; *United States v. Schneiderman,* 102 F. Supp. 52; *United States v. Spector,* 102 F. Supp. 75; *Stack v. United States,* 192 F. 2d 75; *Spector v. United States,* 192 F. 2d 1002.)

On motions to dismiss the two original indictments the District Court in a written opinion held that it was necessary to plead specific "intent to overthrow the Government of the United States by force and violence" and ordered the dismissal of the indictment on this ground. (*United States v. Schneiderman,* 102 F. Supp. 87; Cert. App. B, p. 48 *et seq.*)[5]

A new and single indictment against all of the defendants named in the first two indictments was returned on December 21, 1951. The new indictment was substantially identical with the first two, except for the following:

First, instead of charging as did the first indictment that the conspiracy began in April of 1945 (the date when the Communist Political Association was dissolved and the Communist Party was reconstituted), the new indictment alleged that the conspiracy began on or about June 28, 1940 (the date of the enactment of the Smith Act).

Second, it was charged that the defendants conspired in the particulars set forth in the first two indictments "with the intent of causing the said overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

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[5]Appended to the opinion is a comparison of the indictments in the instant case with that in *Dennis v. United States,* 341 U. S. 494 (Cert. App. B, 68-76). It should be noted that paragraphs 2 to 6 inclusive of *Dennis* indictment have no counterpart here (pp. 69-71). These paragraphs alleged that the *Dennis* defendants, as part of the conspiracy charged, brought about the dissolution of the Communist Political Association and organized the Communist Party as an instrument for engaging in advocacy of violent overthrow of the Government.

Third, 23 overt acts were alleged instead of the 15 set forth in the original two indictments and the overt acts covered the period from January 31, 1941 to July 24, 1951, instead of from July 17 and 18, 1948, to July 24, 1951. The overt acts charged were of the same character in both indictments [Clk. R. 14, 19-24].

Defendants' motion to dismiss the second indictment was denied [Clk. R. 61]. Included in the grounds urged on the motion to dismiss the first two, as well as the last indictment, was the objection that the indictment failed to allege facts showing a clear and present danger sufficient to justify an application of the Smith Act to the defendants. This objection was overruled upon the basis, first, that the charge of teaching and advocacy with the intent to bring about ultimately the overthrow of the Government by force and violence adequately alleged a "clear" danger; second, that the allegation of the specific intent to accomplish the object of forcible overthrow as speedily as possible sufficiently set forth a "present" danger (see opinion of trial court 102 F. Supp. 87, 95-6; Cert. App. B, pp. 48, 64-5). This view of the law was adhered to by the District Court throughout the trial and on motion for judgment of acquittal (see opinion of trial court 106 F. Supp. 906, 923; Cert. App. B, pp. 128, 135-6).

In the motion to dismiss the last indictment the objection was raised that the portion of the indictment dealing with the charge of organizing and helping to organize, as the Communist Party of the United States of America, a society of persons to engage in the proscribed advocacy was barred by the statute of limitations and that it was vague and indefinite [Clk. R, 6, 7, 8]. In supporting affidavits it was shown that the respondent had admitted

in the *Dennis* case that the Communist Party of the United States was organized at a convention in New York City held from July 26-28, 1945, and later in *Stack v. Boyle, supra,* 342 U. S. 1, had asserted in this case that the defendants were charged with participating "in the same Communist conspiracy which was found to exist in *Dennis v. United States* . . ."; had insisted at all stages of the *Dennis* case that the dissolution of the Communist Party in 1944 and the creation of the Communist Political Association was "something fundamental . . . an abandonment by Communists in the United States of an objective, the doctrines and the program which they advocated ever since their founding"; and that in 1945 when the Communist Political Association was dissolved the Communist Party was organized pursuant to a conspiracy to advocate and teach the forcible overthrow of our Government. It was urged by defendants that the organization of the Communist Party having been completed in 1945 the statute of limitations began to run at that time and that the organizing charge was barred by the lapse of time [Clk. R. 9]. In the light of the inconsistencies in the position of the United States, defendants sought by motion for bill of particulars to elicit information concerning the Government's position as to when the conspiracy began and as to whether the alleged conspiracy to organize as aforesaid was ever consummated [Clk. R. 32; App. Item 3, p. 81]. Both the motion to dismiss and that for the bill of particulars were denied without opinion [Clk. R. 61-2].

At the trial evidence was introduced relating directly to individual petitioners as follows:

Oleta O'Connor Yates.

Petitioner Yates was the only petitioner who testified. The record as to her beliefs and her activities is comprehensive and detailed.

1. PETITIONER'S REASONS FOR JOINING THE COMMUNIST PARTY.

She was born in San Francisco in 1910. Her parents were working people with a family tradition of trade unionism [R. 10,159-62][6]. She is a graduate of the College of Notre Dame in San Francisco (a grammar school), Girls High School and the University of California at Berkeley with a Bachelor of Arts and Master of Arts degrees [R. 10,162-4, 10,204]. Because of her family's financial condition, she largely worked her own way through college [R. 10,165-6]. While in college she became interested in economics, and concluded that her college courses did not satisfactorily explain the condition of the country as she found it then, in 1931 [R. 10,168-74]. As a consequence she branched out in her reading to such works as Moore's "Utopia," Bellamy's "Looking Backward," George Bernard Shaw's "Intelligent Woman's Guide to Socialism" and, finally, the works of Marx and Engels [R. 10,174-6]. In the latter writings, she found for the first time what appeared to her to be a reasonable explanation of the world around her—particularly of unemployment and widespread economic hardship in the light of the existing ability to produce enough for all [R. 10,176-9; App. Item 84, pp. 343-4].

About this time, petitioner began to attend meetings and participate in the activities of the unemployed and of co-operative organizations [R. 10,179-80].

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[6]Evidence concerning petitioner's background and the development of her views was admitted on the issue of intent.

As a result of her reading and activities petitioner became convinced that only through their ownership of the means of production in a society in which individuals would contribute to production according to their ability and receive compensation according to their work could the people satisfactorily solve their economic problems [R. 10,195-96]. As a result of her conclusions she joined the Socialist Party in 1932 [R. 10,198-200] and became active as an election campaigner [R. 10,206-8].

Petitioner became dissatisfied with the program of the Socialist Party because it did not concern itself with the day to day problems of the people except through the solution of socialism which she did not consider as an immediate answer [R. 10,210-2; App. Item 85, pp. 344-5]. During this period she came into contact with the work of the Communist Party, and observed that it was conducting campaigns on day to day problems, including particularly the organization of agricultural workers, and improvement of their wretched conditions [R. 10,212-13; App. Item 86, pp. 345-6]. It appeared to her that the Communists were using legal and peaceful means in their efforts to this end but were met by violence at every turn [R. 10,213-36]. She was particularly impressed by the position of the Communist Party that it was possible within the framework of the existing social order to improve the conditions of the people through securing higher wages, unemployment insurance, more adequate relief and similar measures, and that "the immediate task was to fight to improve the day-to-day conditions of the people as a step toward building the kind of movement that would ultimately lead to socialism" [R. 10,241-2].

Petitioner left the Socialist Party in early 1934 when it turned down a proposal for unity, presented by the

Communist Party, around such issues as freedom for Tom Mooney, aid to agricultural workers, and an improved relief system. In September of 1933 she joined the Communist Party while she was still a member of the Socialist Party in the hope that unity would be achieved [R. 10,243-53; App. Item 87, pp. 346-7].

Petitioner entered the Communist Party at a time when the right of Socialists and Communists to compete in the arena of public opinion was given practical recognition. Thus in 1932 Marxism was taught by a Socialist as part of a regular college course in the university she attended, and petitioner was allowed to speak on the Berkeley campus of that University in support of socialism on one occasion and the candidacy on the Communist Party ticket of William Z. Foster for President of the United States on another occasion [R. 10,266-71].

From 1935 to 1943 petitioner held various offices including that of organizer and Educational Director in the San Francisco County Party organization and for a period was a member of the District Committee for District 13, which at that time embraced the Pacific Coast area; she was also a delegate to the 1945 State Convention [R. 455-8; Ex. 546; R. 4552]. From 1944 to 1950 she was San Francisco County Chairman [Ex. 563, R. 4513; GA 448; Ex. 565, R. 4511, GA 448; Ex. 583, R. 4515, GA 449; Ex. 560, R. 4513, GA 448; R. 10,353, GA 378].[7]

In 1950 she became and was at the time of trial the Party's California State Organizational Secretary, and

[7]For a year during 1944 and 1945 the Communist Party was out of existence and the Communist Political Association supplanted it. During that period, the activities and positions held by this and other petitioners were in the Association.

she was a member of the California State Committee [R. 11,228; R. 11,624, GA 418; Ex. 538, R. 4587, GA 459]. Her duties consisted of the organization of Party recruiting drives, checking on dues payments, and assisting various subdivisions of the Party to organize mass campaigns of various kinds such as for peace and civil rights [R. 11,228-31, GA 393-4].

2. PETITIONER'S UNDERSTANDING OF THE GENERAL PROGRAM OF THE PARTY AND THE GENERAL PRINCIPLES OF MARXISM-LENINISM.

The petitioner asserted her adherence to the Communist Party and to the doctrines of Marxism-Leninism as she understood them. She testified at great length concerning her construction of the theories of that body of thought and its application to the United States. She testified as follows:

Her adherence to the Communist Party and to Marxism-Leninism is predicated in part on her belief that Marxists have made important contributions to the democratic development of the United States.[8] As she understands it, that movement played a substantial part in the initiation and growth of the trade union movement; from the beginning it urged complete equality for all regardless of race, color or sex; it contributed substantially to the fight against slavery; it supported the Union in the Civil War; it was in the forefront of the fights for numerous objectives, which are either accomplished facts or stated aims of government today, such as women suffrage, the

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[8]Petitioner's understanding was based largely on non-Marxist sources, such as "A History of the Labor Movement in California" by Ira B. Cross [Ex. JD, R. 10-257-9].

public school system, the abolition of child labor, the establishment of Negro rights and the election of candidates for public office pledged to such objectives [Ex. JD, R. 10,257; Ex. BJ (sometimes referred to as Ex. JE), R. 2975; Ex. MC, R. 11,020; R. 10,965-80, 11,016-22, 11,042-3, 10,256-7; App. Items 5-8, pp. 83-6].

According to her understanding of the principles of Marxism-Leninism, to which she adheres, society has gone through several stages, from primitive communism to slavery, then to feudalism, and then to capitalism; each stage has been an advance over the one that preceded it; socialism is the next stage, to be followed by communism and beyond that it is not possible to see; each successive stage has resulted and will result in more production and greater freedom [R. 10,406-13]. As she sees it, each transition took place because the productive forces of society reached a stage where they could no longer expand under the existing productive relations maintained by the existing form of the state, and not because some individuals willed the change; while ideas can help further the process of social change, neither they nor their advocacy cause it [R. 10,417-19, 10,672-5].

Her position is that the ultimate goal of the Communist Party, in furtherance of the social process which demands change, is to replace the capitalist system by one in which the means of production are owned by the people and are used to produce for the people, not for profit; and that the achievement of power by a government which will undertake and accomplish the overthrow of the existing social system can be accomplished by the ballot box and without violence [R. 10,442-3].

Petitioner's understanding is that Marxism-Leninism conceives of the state as an instrumentality to protect the interests of the dominant or "ruling" class—the owners of the means of production,—the slaveowners at one time, the feudal lords later, and the capitalists today, with each form of the state basing its power on the coercive effect of violence or the threat thereof [R. 10,525-6]; from this standpoint every state is a dictatorship in basic content—a means by which the "ruling class" rules — no matter how democratic it is in form; thus viewed the Government of the United States is a "dictatorship of the bourgeoisie" and that of any socialist government is a "dictatorship of the proletariat"; the democratic processes functioning within a capitalist state may provide a vehicle for the improvement of the conditions of the people, just as a union may be used to improve the conditions of workers, without changing the control of the state any more than the ownership of the factory is transferred by the bargaining of a union [R. 10,533-5].[9]

It does not follow, according to her understanding, that Marxists are indifferent toward "bourgeois democracy"; they regard it as "an essential aspect of the education for eventual achievement of a socialist society, with the greater democracy that it would afford to the masses of people" [R. 10,552-5]; fascism is the other existing form of capitalist state and Marxists consider it their duty to fight for "bourgeois democracy" against fascism; as long as democratic processes are operative and fascism is stopped "there is no need for fearing

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[9]One of respondent's witnesses testified that this was what he taught as a member of the Party [R. 1043, 1049, App. Item 56, pp. 226-7; R. 1050-3, 1077-8, 1085-7, App. Item 58, pp. 233-8).

strife or violence in the effecting of social change"; what the people in the United States want today is more democracy; and socialism is not and cannot become an immediate issue "until the majority are convinced of its necessity" [R. 10,563-77, App. Item 90, pp. 349-50 and App. Item 91, p. 350; R. 10,731-4].

She expressed her understanding that the dictatorship of the proletariat means the rule of a class—the working class—when for the first time the owning and dominant class is made up of the great majority of the people [R. 10,627-9];[10] the socialist state is primarily concerned with the needs and wishes of this overwhelming majority, without the support of which the dictatorship of the proletariat can neither be established nor maintained [R. 10,937-40]; the form of the dictatorship of the proletariat will differ in different countries just as does the form of the "dictatorship of the bourgeoisie" [Ex. 11, R. 10,874-5, App. Item 59, p. 238], but in any event it will be more democratic than the particular capitalist state which precedes it [R. 10,816-20].

It is further petitioner's understanding that the socialist state will substitute its own laws and political machinery for those of the previous form of state; this substitution

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[10] *Cf.* the following language from Lenin's "State and Revolution" Ex. 606: "The state is an instrument in the hands of the ruling class for suppressing the resistance of its class enemies. In this respect the dictatorship of the proletariat in no way differs, in essence, from the dictatorship of any other class, for the proletarian state is an instrument for the suppression of the bourgeoisie. Nevertheless, there is an essential difference between the two, which is, that all class states that have existed heretofore have been dictatorships of an exploiting minority over the exploited majority, whereas the dictatorship of the proletariat is the dictatorship of the exploited majority over an exploiting minority" [R. 11,804].

which involves the elimination of old laws and state apparatus is often referred to as "smashing the bourgeois state"; this refers not to the use of physical force but rather to such things as the abolition of old agencies to make way for the new;[11] the phrase referred to is used in order to emphasize the necessity for changes of the most complete and fundamental character;[12] the specific character of the changes in the United States cannot be predicted; they will vary from nation to nation according to the past background, level of industrial development, literacy of the population and numerous other conditions in each land [R. 10,881-908]; this new state is called the "dictatorship of the proletariat," as that term is used in a Marxist-Leninist sense, regardless of the precise form it takes. Petitioner agrees with the analysis of this term in the *Schneiderman* case: "The concept of the dictatorship of the proletariat is one loosely used, upon which more words than light have been shed. Much argument has been directed as to how it is to be achieved, but we have been offered no precise definition here. In

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[11] *Cf.* the language of Lenin in "The April Conference": ". . . Among Bolsheviks, I have compared this state to the Paris Commune in the sense that the latter had destroyed the old administrative organs and had replaced them by perfectly new ones that were direct and immediate organs of the workers. I am blamed for using a word now exceedingly frightening to the capitalists, for they have begun to interpret it as a desire for the immediate introduction of socialism. I have used it, however, only in the sense of replacing old organs by new proletarian organs." [Ex. 497, R. 12,105-7, App. Item 65, pp. 253-4].

[12] Note the following language quoted by petitioner from "The Paris Commune" by Lenin [Ex. 492, p. 31, R. 4408]: "Thus the Commune would appear to have replaced the shattered state machinery 'only' by fuller democracy, abolition of the standing army; all officials to be fully elective and subject to recall. But, as a matter of fact this 'only' signified a gigantic replacement of one type of institution by others of a fundamentally different order" [R. 10,893].

the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is controlled by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system" [320 U. S. at 142, Ex. KU, R. 11,000-11,004].

Because, according to her understanding, Marxism-Leninism stands for the proposition that the working class will lead the way to greater democracy and to socialism the Communist Party has adopted a policy of concentration on building the Party among workers [R. 10,429-50]; the Party seeks to build itself as a strong mass Party with labor as its base [Ex. 150, R. 1582; R. 11,049-53]; there is concentration in basic industries in each locality because that is where workers are found in largest numbers and because these workers have great influence throughout all of labor; the objects of the policy are to help the workers win improvements in their present conditions, to encourage them to take the leadership "in building a people's movement for peace and democracy" and to lead them to understand "the ultimate need for socialism" [R. 11,085; R. 11,081-5].[13]

To achieve these purposes, petitioner testified, the Party is organized and functions according to a set of principles

[13]This is what was taught in Party educational outlines and reports [Ex. 175, R. 1526; Ex. 55, R. 1582; R. 2252].

known as democratic centralism; it requires that the members of the organization at all levels participate in electing its officers, who, once they are elected, must report back regularly to the membership concerning the manner in which they are carrying out their responsibilities; "it means that after full discussion of problems has taken place and decisions have been reached, that the minority accepts the decision of the majority" [R. 11,059; R. 11,058, App. Item 37, pp. 167-8].[14]

3. Petitioner's Understanding of the Revolutionary Change From Capitalism to Socialism.

As petitioner understands it, the change from capitalism to socialism is revolutionary in character. She defines revolution as the replacement of one set of economic relations by another and the transfer of state power from one class to another, which transfer under some conditions may be accomplished by peaceful, and, under others, by violent means.[15] She believes in the legal right of revolution in the United States—that is the right to achieve these fundamental changes through the democratic processes and she opposes any attempt by a minority to seize power, basing her beliefs in part upon the writings of Thomas Jefferson and other great Americans, and in part upon Marxist writings [R. 10,399; Exs. KJ, KK, R. 10,653-60, 10,663-5].

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[14]One of the respondent's witnesses testified in a similar vein [R. 2455] and the Party's Constitution and official publication define democratic centralism in the same manner [Ex. 21, R. 1518; Ex. 55, R. 1582; R. 1798-9].

[15]A Party outline similarly defined the term revolution [Ex. 626, R. 1425; R. 1785]. *Cf.* Inst. 14 J in which the trial court defined revolution in the same manner [R. 13,764-6, App. Item 2(m), p. 56]. *Cf.* also quotation from "History of the Communist Party of the Soviet Union" Ex. 28 [R. 1362; R. 7034-5, App. Item 68, pp. 257-8; R. 1491-2].

According to her understanding it is the object of the Communist Party to win the support of the majority for socialism and then to lead them in accomplishing this revolutionary objective through peaceful means; the revolutionary change to socialism is impossible of accomplishment without the support of the majority [Ex. KM, R. 10,684; R. 10,675-88, App. Item 92, pp. 351-4; R. 10,691-4, 10,950-2]; until the majority desires socialism it is the program of the Communist Party to seek to convince the people of its necessity and to fight for their immediate needs within the framework of our present system [R. 10,694-7].

Petitioner pointed to various American Marxist writings as setting forth the view she accepts that in the United States a change to socialism could and should be achieved through the peaceful action of the majority of the people if and when they desire it [Ex. KT, R. 10,831; Ex. 515, R. 3036; Ex. BG, R. 2955; R. 10,793-9; 10-821-37, App. Item 70, pp. 262-4; R. 11,413, 11,771-2].[16] In this connection the holding of the United States Supreme Court that this is a tenable conclusion with respect to the meaning of Marxism-Leninism fortified her construction thereof [Ex. KU, R. 11,002; R. 10,837-9; R. 11,010-15, App. Item 96, pp. 359-61.[17] 'Shortly after the decision in

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[16]On this she agreed with the interpretation of these doctrines testified to by two professors in the *Schneiderman* case and referred to by the Supreme Court in that case (320 U. S. at 129, Ex. KU, R. 11,002; R. 11,005-6].

[17]"A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open" (320 U. S. at 157).

that case was handed down in 1943, petitioner attended a California statewide Communist Party meeting where co-petitioner Schneiderman said that the conclusions found to be tenable by the Supreme Court in his case represented his views, which he had presented at the trial [R. 10,954-62, App. Item 95, pp. 358-9].

Petitioner Yates in 1943 and again in 1951 read the transcript of the trial in the *Schneiderman* case and the testimony of co-petitioner Schneiderman as to the meaning of Marxism-Leninism; except for two or three minor points in formulations, she concurred with his views thereof and by her reading of the transcript sharpened and clarified her understanding of the subject [Exs. MM 1, MM 2, R. 11,731; R. 11,726-37].

Petitioner understands a revolution to involve two stages, the first being the gaining of power by the new dominant class and the second, the use of that power to change the existing social order; once power is achieved whether by the ballot or otherwise the state uses the legal instruments of force—the army, police, jails, etc.—in the accomplishment of the social change just as any state uses such power in enforcing its laws; many Marxist-Leninist writings speak of violent revolution in the sense that the legal force and violence of the legally established state will be used to carry out the social change, these writings being polemics against the views of the Anarchists who conceive of the state and its apparatus of army, police, etc. disappearing once power is achieved by the working class [Ex. 39, R. 1352; R. 10,706-9, App. Item 60, pp. 238-41; R. 10,711-31, App. Item 61, pp. 241-3; R. 10,854-70; Ex. 146, R. 1363; R. 10,925,

R. 10,940-50];[18] the violence referred to is that of the legal state necessary to suppress attempts at violent counter-revolution, both from within and from foreign invasions [R. 10,714-15; R. 10,820--1; R. 10,863-5, App. Item 66, pp. 254-5; R. 10,870-3; R. 11,709-11, App. Item 62, pp. 243-5]; in addition to opposing the Anarchists' theory that the state should be abolished when the workers come to power, Marxist-Leninist writings equally condemn the view of Kautskyites that the workers could simply take over the political machinery of the capitalist state and use it for its own purposes instead of creating a new and different machinery of government, which like that of all other preceding states would have its instruments of coercion and force to enforce the laws of the state; it is in polemics against the views that either no state, *i.e.*, no apparatus of coercion, is required by the workers or that the capitalist state machinery can be used as is to establish socialism, that Marxist-Leninist writings most frequently use emotionally surcharged language referring to "violent revolution" and dealing with the necessity for the creation and use of a new form of state, including its "instrumentalities of violence" such as an army and police, by the workers *after* they achieve power in order to complete the transformation from capitalism to socialism, *i.e.*, the revolution [R. 11,538-41; R. 10,912-26, App. Item 57, pp. 227-33; R. 10,933-7; R. 11,701-2].

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[18]Respondent's witness Saunders testified that he was so taught in a state school [R. 1082-7, App. Item 58, pp. 233-8].

4. PETITIONER'S UNDERSTANDING OF THE APPLICATION OF GENERAL PRINCIPLES OF MARXISM-LENINISM TO SPECIFIC TIMES, PLACES AND CONDITIONS.

According to her understanding the general principles of Marxism-Leninism must be applied differently under different conditions; however, by studying their operation under past conditions, it becomes possible in some degree to anticipate how general principles are going to be applied under new and different conditions; there are "certain general conclusions that were reached" [R. 10,192], in basic works, as for example the Communist Manifesto; these included Marxists' analyses of the capitalist system and of classes in society and their conclusion that the capitalist system shows the need for and opens the way toward a socialist system; such general conclusions do apply to the United States, but the forms and methods used in applying such general principles will vary in accordance with the time, country and historical circumstances; thus Marxism-Leninism is the exact opposite of a dogma to be mechanically applied in the same manner under different conditions[19] [R. 10,192-3, App.

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[19]Reference was made by petitioner to many Government exhibits which according to petitioner support this view of Marxism-Leninism, including particularly differences in application of principles between autocratic countries like Czarist Russia and democratic countries like the United States [R. 10,300-24]. Respondent's own witnesses also testified to the same effect and Marxist-Leninist writings offered both by petitioners and respondent contain similar statements [R. 2602; 2630; 2636; 2639-47, App. Item 51, pp. 211-17; R. 2670; Ex. 608, R. 483; Ex. 28, R. 1362; Ex. 12, R. 3784; R. 4143-4, App. Item 48, pp. 206-7; R. 2982-4, App. Item 49, pp. 207-8; Ex. 147, R. 494; R. 1126; Ex. 39, R. 1352; R. 2618]. There is also evidence that from time to time, Marxist-Leninists modify their views. In this connection respondent's own witnesses testified that some writings at one time circulated by the Party in the United States were later repudiated as incorrect [R. 2602].

Item 47, pp. 205-206; R. 10,293-8; R. 10,324-33, App. Item 75, pp. 274-90 and App. Item 89, pp. 348-9; R. 10,706-8; Ex. KS, R. 10,789; Ex. BB, R. 2666; R. 10,-789-93; Ex. JO, R. 10,387; R. 10,386-97, App. Item 50, pp. 208-11; Ex. 163, R. 4535; R. 10,276; R. 10,417-19, App. Item 52, pp. 217-19; R. 10,430-3, App. Item 53, pp. 219-21];[20] it is impossible to anticipate all events in world history and as new developments take place in the world new studies must be made and new conclusions added to the body of Marxism-Leninism; the advent of fascism was such a new development [21] which from a Marxist-Leninist standpoint demanded the building of a great peoples' movement to stop fascism and to defend peace and democracy, which movement could, by teaching the necessity of socialism from the experience of the people, develop in the direction of socialism and open up new perspectives for its peaceful achievement [R. 10,332-5, App. Item 54, pp. 221-4].[22] These conclusions were reached by considering and applying to the concrete situation "the essence and substance of Marxism-Lenin-

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[20]In *Schneiderman v. United States*, 320 U. S. 118, 145, n. 26, an example of Lenin's is cited indicating that it does not follow from the fact that in Russia the socialist revolution led initially to the restriction of the franchise, that the same result would flow from socialist revolutions elsewhere.

[21]See to the same effect testimony of respondent's witness Lautner [R. 2649, App. Item 72, p. 269] and "United Front against Fascism", Ex. 119 [R. 661-5, App. Item 73, pp. 269-72].

[22]A Party educational outline detailed how, it was believed, the transition to socialism through the democratic processes would occur [Ex. 450, R. 3549; R. 3720-32, App. Item 74, pp. 272-3]. Petitioner, in accordance with her understanding of Marxism-Leninism, as applied to the situation in the United States, engaged in activities designed to "bring a greater degree of democracy" to the United States (as will be more fully discussed *infra*) [Ex. JJ, JK, R. 10,339; Ex. JM, JN, R. 10,349; Ex. JO, R. 10,357; R. 10,335-42; R. 10,347-52; Ex. JT, R. 10,458; R. 10,343-49].

ism rather than memorizing the words or the letter of it" [R. 10,376]. This process she testified was the one required by Marxism-Leninism and she referred to specific passages from Government Exhibits so indicating [Ex. JO, R. 10,387; R. 10,376-401]. Petitioner's view is that even as applied to the time and circumstances to which specific Marxist-Leninist writings relate, many of the passages are polemical and every word cannot be properly read literally [R. 10,851-3];[23] her opinion concurs with the Government's concession in the *Schneiderman* case (320 U. S. at 148) that "some communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal."

Marxism-Leninism, she testified, is for her a guide to day to day action; it provides an understanding that will facilitate the further advance of society with the least hardship for society as a whole [R. 10,430-1].

Petitioner firmly denied the charges against her. She asserted her belief in the right of revolution which at certain stages and places in history could only be accomplished by violence but for which our founding fathers provided an alternative, that of "legal revolution," the substitution of "the appeal to the will of the people" for "the appeal to arms"; ". . . so long as the democratic channels, the democratic processes are open, so long as the people have a way to express themselves, they can bring about change in a peaceful and legal manner."[24] She specified: ". . . the only situation or circum-

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[23]". . . Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written" (*United States v. Schneiderman*, 320 U. S. 118, 154.)

[24]From an article by Henry Steele Commager published in the New York Times and adopted by petitioner as expressing her views [Ex. MK, R. 11,161-70].

stances under which I would conceive of the use of force would be these. First, if the majority of the people decided that a new social order was necessary, so expressed themselves, let us say, through the vote, through an election, and yet the capitalist class refused to accept the expressed will of the people and resisted by force. Just as the slave owners in the South resisted by force the election of Lincoln. Or, as a second instance, force would be involved if, after the election or establishment of a working class state, the ousted capitalists attempted to regain power by utilizing force and violence and other methods at their disposal" [R. 10,725].[25] She asserted her dedication to keeping the democratic traditions of our country alive in order that the majority may determine their own destiny through peaceful means. It is within this framework that she stated her adherence to Marxism-Leninism and her intention to fight for the establishment of socialism in this land [R. 11,153-70; 10,174; 10,691-5, App. Item 71, pp. 264-8; R. 10,700-3, App. Item 94, pp. 357-8; R. 10,939].[26]

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[25] *Cf.* the following language of Lenin: "In order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used against the masses, there is no other road to power. We are not Blanquists, we are not in favor of seizure of power by a minority" quoted in *Schneiderman v. United States*, 320 U. S. 118, 156 in support of the proposition that it is a tenable conclusion that Marxism-Leninism does not advocate the violent overthrow of our Government.

[26] *Cf.* with the quotation in *Schneiderman v. United States*, 320 U. S. 118, 156 of the following language from Stalin's work on "Leninism" ". . . . the proposition that the prestige of the Party can be built upon violence . . . is absurd and absolutely incompatible with Leninism." This "Marxist classic" was introduced here as respondent's Ex. 146, R. 1363 [R. 3638-9]. *Cf.* also with language in Party outlines and what was taught in Party schools [Ex. A, R. 932; R. 10,911-12; Ex. 626, R. 1435; R. 1800-2; R. 1788; Ex. 201, R. 2751; R. 3150-1; R. 3056].

5. The Evidence of Petitioner's Activities.

There is evidence of the following meetings and conventions attended by petitioner: in 1937, a District meeting at one of which there was criticism of a "Trotskyite" article appearing in the Western Worker [R. 447-51], another at which the setting up of the People's World and a letter concerning it from the Party's National Committee were discussed [R. 439-44, GA 3-5] and meetings at which the content of the "Western Worker" was the subject under consideration [R. 445-7, GA 5-6]; between 1944 and 1948 many meetings of the Party County and State Boards [R. 5431-53, GA 223-34; R. 7771-8, GA 358-60]; in 1945 the California State Convention at which the reconstitution of the Communist Party was considered [R. 615-22, GA 14-16]. In the summer of 1946 she attended two meetings at which the issue discussed was the refusal of a dissident group to work with the Party in opposing the extension of a certain machinists' strike. At one of the meetings charges against the "dissidents" for "anti-party activity" were the subject of a hearing, following which the "dissidents" were expelled by a vote of the membership. Although there is evidence that petitioner Yates spoke at one of the meetings, there is nothing in the record about what she said [R. 4386-93, GA 150-3].[27]

Later in 1946 she attended two branch meetings at which two members of the branch were charged with attacking the Party leadership in a union, associating with expelled members and supporting the views which had led to such expulsion. In defending himself, one of the

[27]The expulsion of these members, who were generally referred to as "leftists", will be discussed further *infra*.

members charged, accused the Party of not being a revolutionary one. Whereupon petitioner Fox, who was also present, said that the Party was "not going to stick its neck out to support every whim" that came into the mind of the person under charges "and take a chance of getting its head chopped off"; that the Party was "revolutionary"; "that he wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not yet arrived" [R. 4386]. There was no evidence as to what if anything petitioner Yates said [R. 4381-6, GA 147-50].

In November 1946 she spoke at an Embassy Auditorium meeting at a rally for American-Soviet friendship held on the 29th Anniversary of the U. S. S. R. The meeting was directed to the "fight against danger of war" and against the "Republican drive to eliminate all rent control" [R. 4337; R. 4334-8]. She spoke on Soviet power and its influence in Burma, Yugoslavia, Czechoslovakia, Bulgaria, France and Italy [R. 3902-4, GA 135-6].

In 1947 she presided at a meeting of club chairmen concentrating on transportation [R. 5458-9]; installed new officers in a club [R. 5457-8]; attended a meeting in San Francisco at which William Z. Foster spoke [R. 4481-2];[28] and, at a club meeting, assisted in the reregistration of club members [R. 6581-2, 6589-91, GA 282-4]. In 1949 she spoke at a meeting "opening the press fund drive for the People's World" [R. 3577]. In 1950 she attended the Party's State Convention [R. 11,316, GA 403-4]. Before the Convention it was announced that she was on a special committee to help develop the pre-

[28]The evidence that he spoke on his trip to Europe and the need for building a third party was stricken from the record.

convention discussion [Ex. 181, R. 2832; GA 99-100, 579]. In 1951 she met with Los Angeles Party leaders, at which time she met with petitioner Carlson [R. 11,231-4, GA 394-5].

Respondent's witness Daisy Van Dorn testified to two incidents involving petitioner Yates. On March 8, 1945 the witness, whose name was then Mrs. Rodman, was employed as an elevator operator in the building in San Francisco where the Communist Party maintained its offices. At that time she joined the Party at the request of the F.B.I. [R. 7765]. According to her testimony she received compensation from the F.B.I. for her services as an informer at the rate of $15 a month for about six to eight months and thereafter at the rate of $50 a month up to about a month or two before June, 1948 during which month or two she received more [R. 7888-90]. However, the respondent stipulated that during this period she received as such compensation a total of $4,265.00 [Ex. NA, R. 12,156; R. 12,155-62].[29] She testified that she would accept no witness fee for her testimony and that she had accepted compensation as an informer only because she had a very sick husband [R. 7889-90].

In April, 1945, during the United Nations Conference in San Francisco, this witness testified that she attended a reception for "Mother Bloor." She went on: "And she (Mother Bloor) said she was so happy at being in San Francisco at this time on the eve of our great rebellion district (*sic*). She said it is not far off, and she said, 'I am 83 years old and I will live to see this

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[29]The period covered was approximately 42 months indicating average payments of $100 a month, of which $405 was earned in 1945, $150 in 1946, $1450 in 1947, $660 in 1948 and $1000 in 1949.

bloody battle through.' She said, 'There will be blood flowing in the Streets.' She says it is going to be a wonderful revolution. And she said, 'I hope each and every one of you here will be true to us.' And she said, 'Win this country for us.' She said, 'If you do, you will be in Washington because we are going to take over this country and run it in a socialistic manner.' She said, 'Just be a good Red Bolshevik and remember there are three S's—slick, sly, and smooth.' But, she said, 'always be nice to people, treat them, talk to them in a nice churchy way.' She says, 'Don't be rough. You won't win the people over that way.' She really gave a wonderful talk. And then she also told us that . . . she said the day of the revolution was nigh; we were on the threshold of this revolution and she says 'We are prepared to the point that we have arms awaiting for us'" [R. 7820].

On cross-examination the witness conceded that Mother Bloor at this meeting said, "I am happy to have lived to see the eve of our great victory over fascism. . . . It is wonderful that all the peace-loving nations of the world are gathered in San Francisco to form the United Nations which should be the basis for a lasting peace. . . . The forces of fascism are on the run and you and I will live to see the final victory over the forces of fascism," and that she talked "about the great loss that this country had incurred upon the death of Mr. Roosevelt who had died a few days earlier"—that "she said we had lost our best friend, that he has stood beside us, and that we don't know about Truman, that we are going to give him a trial" [R. 8002-3].

The witness testified that the next day she had a conversation with the co-petitioner Schneiderman in which

she said that she "enjoyed that reception very very much and that their table looked beautiful. They had a buffet table set." And she went on: "And I thought that Mrs. Bloor was a very eloquent speaker. I told him I thought she sang wonderfully for a woman in her eighties. I also said that she was quite privileged to go up and be at a conference with Molotov, and she so enjoyed that corsage that was given to her—by whom, I don't know. And he said, 'I am glad you enjoyed it, Mrs. Rodman. But,' he said, 'we don't want anything that went on at that meeting to be divulged to the rank and file.'[30] He says, 'There are different classes'—not classes of people—'but different classes, different in our Communist Party.' And he says, 'Just keep everything that Mother Bloor said at that meeting to yourself, because we wouldn't have that go through the party.' He said that the party—there was only a few invited to that party, and we want that information to be kept quiet, everything that she said. So I have never divulged it" [R. 7817-18].

The witness also testified that on the same day she had a conversation with the petitioner Yates in which she told the petitioner Yates how much she enjoyed the reception and was told by said petitioner to say nothing about the reception, to keep everything to herself. "You know that very few were included in that reception . . . so be quiet about it" [R. 7818-20].

The same witness testified that the reception was held at the home of a Mrs. Batchelor, that she did not know Mrs. Batchelor to be a Communist Party member, that

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[30]At the time that the witness attended this reception she was a rank and file member of the Communist Party and had been a member for a total period of about one month [R. 7989-8004].

she received a printed invitation to the reception which she did not turn over to the Federal Bureau of Investigation, that she knew of two persons in attendance at the reception who were not Communist Party members and there might have been others, that the two she knew of were ladies who were neighbors of Mrs. Lambert who invited them there, and that these two expressed their shock at what they heard [R. 7989-95].

A number of photographs of the persons present were taken at this reception [R. 8003-4]. Mrs. Batchelor, at whose home the meeting was held, testified that she was not a Communist, that her house was rented for the reception, that none of the blood and thunder statements attributed to Mother Bloor by Daisy Van Dorn were made, that the reception was to such an extent an open one that there was present at it a young man who just happened to be staying with her at the time [R. 12,113-17, 12,127].

The petitioner Yates testified that the affair was not a Communist Party affair, that it was purely social, that Mother Bloor did make a speech in which "she addressed herself to the victory over fascism on the military field that was then in sight, and said that she was glad and happy to have lived to see the forces of fascism, the Axis, coming to defeat . . . that she regarded it as a tragedy that President Roosevelt's death had occurred at such an untimely point; and that she would have wished that the war-time leadership he gave to the nation would have been continued for the building of an enduring peace. And she also said that the world would be a much better place to live in when peace was assured. And I am sure she also said that she believed and hoped and

believed that there would come a day when the people in our country would see the need for a socialist system to bring them a permanent peace and prosperity as she saw the need for such a thing." Petitioner testified that there was no truth to the version of the speech given on direct examination by the witness Daisy Van Dorn. She denied that after the reception she had any conversation with Daisy Van Dorn concerning it [R. 10,841-9].

The second remarkable item added to the record by this witness was that in April, 1947 she bought five ten-cent chances at a raffle conducted at her Communist Party club; that she won, as a result of which she obtained the book "The History of the Civil War in the U. S. S. R." [Ex. 251, R. 7810], for which she then paid $3.08; that the next day she talked to petitioner Yates who told her that she must be very careful of the book, that she should read it through and turn it over to the chairman of her club, that "it was the general outline of which the revolution was to be carried on" and that "there were very few copies to send over from Russia." The witness said that the same day, outside of the presence of petitioner Yates, co-petitioner Schneiderman told her that there were about 500 copies of this book smuggled into this country by the loyal seamen of the Communst Party and that there were a total of six copies available either for the state or for the city—she did not recall which [R. 7802-10].

The witness testified that nobody at the club meeting had told her to keep the book a secret [R. 8023]. It was stipulated by the parties that the Los Angeles Public Library circulates the books and has three copies, ordered by the Library from an English concern in London on

August 4, 1947 [R. 8033]. It was also shown by documents admitted into the record by stipulation that the "History of the Civil War in the Soviet Union" was in fact shipped in the regular way and passed through United States Customs [R. 11,132-4; Exs: HT-1 and HT-2, R. 11,132].[31]

Petitioner testified to a whole series of acts of force and violence and harassment directed against the Communist Party and its members, including the destruction of the Party offices and attacks on private homes by both police and vigilantes in 1934 [Ex. JT, R. 10,458; R. 10,221-34, 10,470-81, 10,491-503]. Her experiences indicated the necessity of some secrecy ("underground" in the vernacular of respondent) in the work of the Party and in the names of its members precisely for the purpose of protecting its legal activities against illegal violence, job discrimination and other harassment [Ex. FG, R. 5095; Ex. BJ, R. 2975; R. 10,494-8; R. 10,516-17; R. 11,068-80; R. 10,479-80, R. 10,491-93, App. Item 76, pp. 290-3].

The conclusions drawn from her own experiences were fortified by her understanding with respect to other illegal attacks upon the Communist Party, including the Palmer Raids [Ex. MD, R. 11,030; R. 11,028-37], raids upon Party headquarters, attacks upon Party leaders and their homes and vigilante action against meetings of the Party

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[31]The petitioner Yates denied that a conversation between herself and Daisy Van Dorn concerning this book ever took place and testified that the book was sold openly in book stores (which was never denied) and that therefore it was ridiculous from any standpoint to keep the book a secret [R. 10,849].

or meetings so labelled [Ex. MD, R. 11,030; R. 11,037-42; Exs. MG, MH, MI; MJ, R. 11,076; R. 11,075-80].[32]

In 1944, the Communist Party was dissolved and the Communist Political Association was formed [R. 1222, 4232, 4246, 4251-2; R. 11,086; Ex. 42, R. 581; R. 605]. In 1945, the latter was dissolved and the former reconstituted. Petitioner's belief is that the dissolution of the Communist Party and the formation of the Communist Political Association were based upon an erroneous construction and application of the principles of Marxism-Leninism: the Association was founded on the concept that the workers would not have to use their economic and political power (engage in the "class struggle") to achieve improved conditions but that the capitalist class would, without a fight by the labor movement, itself improve the conditions of labor, for example, by doing such things as voluntarily doubling wages; whereas the Communist Party was reconstituted on the theory that "the working class can make gains and advances its interests" only "by reliance upon its own organized strength" rather than upon the good will and intelligence of the "capitalist class"; in addition, the Association did not adequately recognize that the working class had to play the decisive role in the fight against fascism; the Association "virtually

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[32]There was a considerable volume of evidence from respondent's witnesses and in the form of exhibits showing illegal attacks upon the Party and its members and violation of their legal and constitutional rights [R. 5901; Exs. FX, GC, R. 5922; Ex. GA, R. 5923; R. 5911-28; R. 5893; R. 4471, 1332]. One of respondent's witnesses testified that a "New York underground" was created because "it was necessary to have a structure in case even if the Party is driven underground, to have an organization force [*sic*] that can fight its way back into legality" for which purposes there were prepared "printing machines, mimeograph machines" and similar weapons [R. 2255, 2258, 2283-7; R. 2565, App. Item 76, p. 293].

abandoned the perspective of socialism, and in practice gave up any serious education for socialism"; the Communist Party, on the other hand, was reconstituted on the theory that while socialism "was not an immediate objective but an ultimate goal;" education for socialism was essential because only it could permanently solve the problems of the people;[33] however, neither the Association nor the Party stood for the proposition that the Government of the United States should be overthrown by force and violence [Ex. 442, R. 6712; R. 11,085-100, App. Item 9, pp. 86-91]; the Association, like the Party, stood for full support to the war effort and the policies of the Roosevelt administration generally, but the Association, because it did not run its own candidates for public office, failed to put forward this program to the best effect and therefore did not make the maximum contribution possible to the war effort [R. 11,100-5]; both the Association and the Party also sought "to achieve the widest democratic coalition and the most effective anti-fascist unity of the nation" designed to destroy fascism, curb the powers of the trusts and monopolies, and thereby advance the economic welfare of the people and protect and extend American democracy [Ex. 42, R. 581; R. 10,569-70, App. Item 11, p. 97].[34]

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[33]The fact that Marxism-Leninism is subject to different interpretations is indicated by the testimony of petitioner on this score: "I believed that I was continuing these Marxist principles and did not until later realize that I had helped distort them" [R. 11,099].

[34]To the same general effect as the testimony of the petitioner on this score, see the testimony of respondent's witnesses Saunders [R. 1213-20, App. Item 12, pp. 98-102], Hamlin [R. 1927-34] and Lautner [Ex. 42, R. 581; R. 2445-82, App. Item 13, pp. 102-14]. See also respondent's Ex. DW, R. 4264; [R. 4264-9] and Ex. 42, R. 581; [R. 4239-48, 4253-4, 4358-61, App. Item 10, pp. 91-7; R. 1927; R. 11,090].

Following the reconstitution of the Communist Party, there were warnings from the leadership of the Party against falling into "leftism," as for example, by calling for socialism (as distinguished from educating for it) before the people desire it. As petitioner Yates defined it, "a leftist position tends very much to overlook the wishes of the majority and tends likewise to push forward a position that is in essence a minority position" [R. 11,106; Ex. 442, R. 6712].

Respondent's witness William M. Foard (whose testimony concerning himself casts light on all of his testimony) testified that when he joined the Communist Party in 1945 he did not have the intent to overthrow the Government by force and violence but that he formed it several months later when he first became friendly with one of the "leftists" referred to above who was later expelled for his "leftist position." The witness continued his association with the "leftists" after they were expelled and while he was still a member of the Party. He ceased having the intent of violent overthrow several months before he left the Party. But he did not leave the Party because of any difference with it on that issue, but rather because he disagreed with the Party's support of his union's leaders whom he believed corrupt and "not fit for union office" [R. 4709-13, 4846-51].

He testified that while he was a member of the Communist Party he was taught in his club (not by any of petitioners) that a transition from capitalism to socialism would be a "drastic change" and hence a revolution; that it was the object of the Party to achieve the establishment of socialism by the free choice of the majority of

the American people; that it was predicted that when the majority would thus exercise their free choice, the minority would not be willing to accept the wishes of the majority and would resist by violent methods. Thus, he understood, because the minority would not permit the majority to make such a revolutionary change peacefully, part of the process of the revolution would be violent [R. 4902-3, 4912-13].[35]

During 1948, before he left the Party, he heard discussions of the new perspective of a peaceful change from capitalism to socialism as embraced in William Z. Foster's "The New Europe" [Ex. BA, R. 2548] but this was a matter with which he "was not too much concerned" or "interested" [R. 4876-8].

This witness testified to a Party meeting held in February, 1947 at which petitioner Yates and co-petitioner Schneiderman spoke, the latter on the subject of "left sectarianism and right deviations.". There is nothing in the record concerning what petitioner Yates said. According to the witness Foard, co-petitioner Schneiderman stated that the "leftists" who had been expelled wanted the Party "to embark on adventurous campaigns that would lead to the destruction of the party"; that "before revolution can be thought of, we must first build a mass base among labor, farmers, and minority groups"; that the "ultimate goal was the establishment of socialism"; that "finance capital would never give in without a fight";

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[35]Note that in *Schneiderman v. United States,* 320 U. S. 118, 153, n. 40, many official utterances of the Party were disposed of by the Court: "These statements are open to an interpretation of prediction, not advocacy of force and violence."

that thus a revolution would involve violence and sacrifice [R. 4376-80; GA 145-7].[36]

In 1946 petitioner Yates wrote an article for "Political Affairs" concerning "leftists," entitled "The Struggle Against Deviations and Factionalism in San Francisco." This article was a "polemic" against the people who "did not agree upon the building of a people's anti-fascist coalition around the immediate problems and issues before the people" and who advocated "an immediate move toward socialism." These leftists were criticized in the article because they opposed the Party program in the following respects; they did not approve of the Party's program for peace; they did not agree that the Party should do everything possible to join in a coalition campaign with all progressive forces to defeat reaction; they opposed participation in election campaigns as part of an anti-fascist coalition; they disagreed with the Party's criticism of the Machinists strike and of the Party's disapproval of the strike being spread to the waterfront and of the tying up of troop ships and of otherwise extending the strike; in connection with this same strike they were in favor of the Machinists strike being spread into a general strike while the Party opposed this and urged settlement of the Machinists strike; they took the position that "strikes are always a gain for the working class regardless of whether they are won or lost," whereas the Party opposed this "leftist" position; they disagreed with the Party's support of the principle of settlement

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[36]Compare this with the finding of the Supreme Court in the *Schneiderman* case that a "tenable conclusion" was that the Party "justified" violence "only" against "an attempted forcible counter-overthrow" or "to enforce the majority will" if "peaceful channels were no longer open" (320 U. S. at 157).

of a maritime dispute without a strike and of the Party's opposition to the calling of a maritime strike for political reasons; they differed with the position of the Party that the Fair Employment Practices campaign was important. Petitioner's article opposed the position of the "leftists" and supported the viewpoints which had been taken by the Communist Party [Ex. 639, R. 1582; R. 4456, 4674-4708; App. Item 83, pp. 334-43]. The "leftists" were expelled from the Party because of their positions, in which they persisted [R. 11,110-11].[37]

There is other specific evidence of petitioner Yates' connection with Marxism-Leninism and her interpretation thereof. In 1937 petitioner assisted in arranging for and conducting a Party State school. According to one of respondent's witnesses, in lecturing at the school on the organization of the Party, petitioner used Exhibit 61 [R. 523], "The Communist Party, a Manual on Organization," and referred to various writings of Lenin and other Marxists. Although the respondent's witnesses attended the lectures, the respondent offered no testimony as to what portion of the books were used or what was said with respect to them [R. 248-9, 463-5, 472-8, 523; R. 458-60, 463-66, 498, GA 8-9]. Petitioner testified that she did in fact teach at this school but that her subjects were the "American Revolution of 1776" and the "Civil War and the Reconstruction Period following it," and she submitted the lecture notes used by her at the school. These notes contain nothing which by the

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[37]The witness Foard testified that this article was discussed at his club, from which "leftists" were expelled, and in that discussion the differences between leftists and the Party were confirmed [R. 4674-5, 4687-93, 4696-7, 4702, 4705-6, App. Item 83, pp. 334-43].

remotest inference could be construed as advocating the forceful overthrow of our Government [Ex. KN, R. 10,658; Ex. JG, R. 10,273; R. 10,653-63].

She taught a Marxist class in 1947, but respondent's witness who attended the class did not testify at all as to what was taught [R. 7799-800, GA 368-9].

In 1949 petitioner together with co-petitioner Schneiderman prepared an educational outline on Marxism-Leninism and assisted in the preparation and approved the contents of two outlines on American History and one on "The Negro Question." These outlines give references to the works of Marx, Lenin and Stalin "not to be used as a blueprint" but in order to gain an understanding of the main principles contained in these works to be utilized to assist "in finding ways to solve problems today" [Ex. 163, R. 3545; Exs. JF, JG, JH, R. 10,273; R. 10,271-6, 11,255, GA 396-7]. In the History outlines non-Marxist writers are frequently cited and the reasons given for the study of American History include the gaining of an understanding of the democratic and socialist traditions of this country in order "to help build the broadest coalition for democracy and peace" [R. 10,279] and their use in the "further development of working class movement toward socialism" [R. 10,278-84].

Also in 1949 petitioner examined and approved an outline for new members classes [Ex. LA, R. 10,909-10]. This outline stated that socialism is needed in this country and in order to achieve socialism "it is the duty of each Communist to keep educating the American working class on the need for the establishment of socialism as the only secure method of taking care of the needs of all the people," that the United States would have to work

out its own road to socialism in relation to its "particular history, traditions and concrete conditions" [R. 10,911].

In 1946 petitioner Yates jointly with petitioner Carlson prepared "A Handbook for Club Officials" [Ex. MF, R. 11,056] to help organize the work of Party clubs. This states "that the aim and purpose of the activity of the Communist Party club is to bring some understanding of the need for socialism and to win improvements in the conditions of workers today." It proposes as issues "the fight for jobs and wages, fight for FEPC, fights for peace, election campaigns, city issues and so on." As methods of work it suggests public meetings and forums, circulation of the press and literature and of petitions, letter writing campaigns, mass delegations and similar forms of activity [R. 11,057-8].

Petitioner on several occasions was a Communist Party candidate for public office. In 1943 she was a candidate for the San Francisco Board of Supervisors on a program calling among other things for a city committee on race relations, which was created in 1944 and to which she was appointed as a representative of her organization [Exs. JP, JQ, R. 10,357; R. 10,353-66; Ex. LR, R. 10,365, App. Item 19, pp. 126-7]. She ran again for the same office in 1947 and 1951. In the 1947 campaign she distributed literature calling upon citizens to register and vote, and she proposed night meetings of the Board of Supervisors, opposed the sales tax, urged an attempt to get more federal funds in housing, advocated the freezing of rents, proposed action to eliminate segregation, restrictive covenants, and discrimination, including an F.E.P.C. program, condemned police brutality, advocated slum clearance, more recreation centers, large-scale

public works, a municipal low fare subway and employment of women on municipal railways, and said these things could be accomplished only through a new municipal administration which included representation of working people [Exs. EN, EP, EK, EL, EM, R. 4636; Ex. JW, R. 10,584; Ex. JA, R. 10,220; Exs. KB, KC, R. 10,599; Exs. KD, KE, R. 10,601; R. 4632-40, App. Item 20, p. 127; R. 10,577-604].

Petitioner engaged in many other activities. She participated in 1934 in union campaigns to raise relief and public works standards [R. 10,444-6]; in 1938 in picketing of ships carrying scrap iron to Japan [R. 10,423-6]; in a recall campaign in 1946 directed against the Mayor of San Francisco because of his stand on such issues as fair employment legislation, wage increases for city employees and tax policies [Ex. JS, R. 10,434; R. 10,433-42]; in campaigns for jobs and adequate housing for Negro workers [Ex. EF, R. 10,606; R. 10,605-11]. She appeared before a state legislative committee in opposition to "loyalty oaths" at which time she challenged as a "lie" the charge that the Communist Party advocates the overthrow of the Government by force and violence [Ex. KI, R. 10,622; R. 10,621-7, App. Item 93, pp. 354-6].

Petitioner Yates considers the Constitution of the Communist Party as meaning "exactly what it says" and "that no other documents or material of any kind that conflict with the Communist Party Constitution is binding" [R. 11,080].[38] The Party Constitution adopted in 1945

[38]Here, unlike the record in *Dennis*, there was no testimony that any of the petitioners understood the Constitution as meaning the opposite of, or in fact anything other than, what it says.

and in effect at all time since contains the following clause:

[*Appeals and Disciplinary Procedure.*]

"Section 2. Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion." [Ex. 21, R. 1518; R. 5117.]

The 1948 convention of the Party added these provisions, apparently as a result of the intervening experience with the "leftists" (discussed *supra*):

[*Appeals and Disciplinary Procedure.*]

"Section 3. Any member shall be expelled from the Party who is found to be a strikebreaker, provocateur, engaged in espionage, or who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies."

[*Rights and Duties of Members.*]

"Section 9. Members are obligated to fight with all their strength against any and every effort, whether it comes from abroad or from within our country, to destroy the rights of labor and the people, or to impose upon the United States the arbirtary will of any group or party or clique or conspiracy, thereby violating the unqualified right of the majority of the people to direct the destinies of our country." [Ex. 153, R. 2089].

Henry Steinberg.

The evidence that petitioner Henry Steinberg participated in a "Lenin Memorial" meeting is discussed by the court below as illustrating the adequacy of the proof with respect to petitioners' participation in the conspiracy charged and their specific intent to achieve its alleged objective [Clk. R. 122-3].

Petitioner Steinberg was shown to have been a member of the Young Communist League as of 1936 [R. 5526]. A witness stated that in 1940 "he had come into his own as kind of the practical politician for the Communist Party" in Los Angeles [R. 5529]. At that time he participated in discussions of election campaign slogans and in planning election campaigns, including the presidential campaign and that of the Communist Party for Southern California [R. 5528-9].

In 1950 petitioner was the Party's Legislative Director for Los Angeles County [Ex. 517, R. 4551, GA 455]. He registered for voting as a Communist [Ex. 521, R. 4546-7, GA 454; Ex. 518, R. 4547, GA 454] and ran for public office as such in 1940 [Ex. 516, R. 4549-50, GA 454] and again in 1950 [R. 2826-7, GA 98-9].

On the latter occasion, petitioner, as a candidate for the Board of Education, advocated the right of teachers to bargain collectively, to be free of loyalty oaths and other inquisitorial conditions and, together with their students, to inquire freely into the domain of ideas. He urged "democratic school board practices" including the elimination of discrimination and segregation in the hiring of teachers and in the use of school facilities. He called "for a program which will train our children for peace not war, free and full education, with teachers free from

spying and fear, able to properly prepare our children to assume their responsibilities in this changing world". [R. 3282-5]. In his public speeches he asked for neighborhood rallies and the distribution of leaflets to secure support for his candidacy [R. 3277, 3286]. In 1951, petitioner spoke at a Party election rally; what he said does not appear in the record [Ex. 359, R. 2846, 2844-7].

In 1946 or 1947 he was the Party's Educational Director for Los Angeles County [R. 3941-4, GA 138-9]. He was also shown to have attended various Party meetings: a Los Angeles County Committee meeting in 1942 [R. 5583, GA 256-7]; a meeting in San Diego in 1949 at which co-petitioner Schneiderman spoke [R. 1343, GA 30]; a closed Party meeting in Los Angeles in 1950 [R. 2825-7, GA 98-9]; and the same year a Daily People's World[39] circulation drive meeting in Los Angeles [R. 2819-20, GA 95-6]. He was advertised as a speaker at a meeting sponsored in 1950 by the Party's Los Angeles County Educational Committee [Ex. 358, R. 2828]. The record is barren of anything that was said or done at these meetings.

[39]A newspaper supported by the Communist Party.

The record is silent as to the duties of the offices of County Educational and Legislative Director held by petitioner. There is no evidence of any advocacy of force and violence by him or of any agreement to engage in such advocacy at any time. Nor was petitioner shown to have been present when others engaged in such advocacy or entered into such an agreement. Petitioner is not connected with any specific Marxist-Leninist writings, let alone any of the hundreds of quotations therefrom read into the record by respondent. Nor is there any

evidence that he construed Marxism-Leninism or the program of the Communist Party as calling for the forceful overthrow of our Government or the advocacy thereof.

The evidence relied on by the Court of Appeals as establishing the requisite intent and connection with the conspiracy consisted of petitioner's chairing of a public Lenin Memorial meeting held in Los Angeles in 1949, with an attendance of between 1500 and 1700. At this meeting he made "several speeches" [R. 8067], but aside from the fact that he stated that the affair was a Lenin memorial the record does not disclose what he said. The meeting, sponsored by the Communist Party, was announced in the People's World [Ex. 737, R. 8070], as a demonstration of its support for the Bill of Rights; it was announced that the meeting would "serve primarily as a protest against the current trial in New York of 12 national leaders of the party" [R. 8072]. Petitioner Ben Dobbs made the main speech of the evening, but the content thereof was not the subject of any evidence [R. 8066-75, GA 207-11, App. Item 77, pp. 294-7].

Upon this evidence, the Court below sustained a finding that petitioner was party to a conspiracy to advocate the overthrow of the Government of the United States by force and violence and to organize, as the Communist Party of the United States, an organization dedicated to such advocacy, all with the specific intent to achieve such violent overthrow as speedily as circumstances would permit.

Frank Carlson.

This petitioner was shown to have been California State Director of the Young Communist League in 1935 and 1937 [R. 548, 5519-25; GA 11, 246]. In 1945 and 1946 he had an office in the Communist Party headquarters in San Francisco [R. 7784, 7790, GA 362, 365]. In April 1947, petitioner was State Secretary of the Communist Party in Wisconsin [R. 7790-1, 6560-1; GA 365, 280, Ex. 729, R. 7442-4]. In 1949 he was a "County Organizer" in Los Angeles [R. 2748, GA 84].

This petitioner is shown to have attended many meetings and conventions but in no instance is there any evidence as to what was said and done. Thus the record simply shows that in 1936 petitioner attended "underground meetings" of the Young Communist League in Los Angeles [R. 5976-80] and that in the same year or the next he attended a national convention of the Young Communist League [R. 6227].

In 1937 and 1938 he attended State Committee meetings of the Young Communist League [R. 5520-5, 5543, GA 246, 250]. In 1945 he "occasionally had a meeting" in the San Francisco headquarters of the Communist Party [R. 7903], and attended its California State Convention [R. 615-16].

In 1946 petitioner met in Los Angeles with one of respondent's witnesses who had been directed to Carlson by the San Diego Party Organizer and later in that year petitioner met with the Party's San Diego County Committee [R. 1345-7, GA 30-1]. In 1948 he attended a

Los Angeles County "functionaries" meeting [R. 4980, GA 183]. In 1949 he was introduced at a session of a "Marxist Institute" [R. 2748, GA 84]. In 1951 he met frequently with petitioner Yates in connection with her duties as an official of the Communist Party [R. 11,232-3, 11,252, GA 395-6].

The witness Estrada gave the most detailed testimony on behalf of respondent concerning petitioner Carlson. At the time of testifying he had been a member of the Milwaukee police force for a little over two years [R. 6468, 6497]. He is a law school graduate but has never been admitted to the practice of law in Wisconsin or elsewhere [R. 6497-8].

In 1946, before he ever had any contact with the F.B.I. and while he was attending law school and working in addition, he attended two or three Communist Party club meetings, although he was not a member. He then went to the F.B.I. and volunteered to become an informer [R. 6499-6510]. He testified that he joined the Party at the request of the F.B.I. (which request was made in September 1946), but he did not become a member until about March of 1947, prior to which he attended about 21 Party meetings [R. 6509-16]. He further testified that he turned in to the F.B.I. all written material that he received within the Party, except his own Party Card which he tore up because it "wasn't important" [R. 6521-2]. He "never bothered to read" the "stuff" he turned in [R. 6538]. His function as an informer was to keep his "mouth shut and listen" but when there was talk about Marx and Lenin he "wasn't interested" [R. 7146, 7150]. He testified that he received no compensation or expense money at all for acting as an informer,

and in fact that he spent fifteen to twenty-one dollars of his own money buying books which he turned over to the F.B.I.; the respondent stipulated that in 1947 this informer received $144.50 from the Department of Justice in connection with services performed in reporting to the Federal Bureau of Investigation [R. 6503-4, 7252-6; Ex. NA, R. 12,156, 12,155-62].

He testified that the Communist Party was always telling the Negroes to "fight for housing, fight for this, fight for that" and that Negroes "didn't have to fight before [the Communists started agitating], we always got it." His major activity while in the Party was to distribute leaflets on the F.E.P.C. and housing. In the face of government reports showing that housing conditions in the Negro District in Milwaukee were very bad and by far the worst in the city, this witness denied that any Negro housing problem existed and asserted that the Communists weren't telling the truth when they said there was such a problem. He also testified that, only because of their lack of desire, Negroes didn't work in many industries and employments and were limited to menial jobs in others [R. 6552-7, 7148-9, 7172-7215]. On reports that he turned in, he indicated which persons were white, which were Negro and which were Jewish. This was his "own idea," not the instructions of the F.B.I. [R. 7361-2].

This is the witness who testified to the following as being said by petitioner at petitioner's home in 1947 following a dinner to which the witness had been invited by him:

> "Then he went on to state that the Negroes, the party had been helpful to the Negroes in the South.
>
> "I asked him, 'In what way?'

"He says, well, the Negroes down there had received some pretty severe kicks, and he related a case where 200 white men were chasing one Negro to lynch him, and they were met by 100 other Negroes armed, who repressed their attack, the 200 white men's attack upon this one Negro.

"He said, 'Therefore, you can see that the party has been helpful to the Negro in the South.'

"I then asked him how did the people get guns, the Negro people down in the South get guns.

"He says, 'Well, the party has methods of doing so.'

"Then he says, 'You know, I would like to have you organize a United Negro and Allied Veterans of America organization,' he says, 'because it will be necessary in the event of a revolution in this country to overthrow this country by the Communist Party, that the Negro boys in the North will have to be militant enough to guide the Negro People in the South.'" [R. 6480, GA 278.]

However, the witness' contemporaneous report to the F.B.I. repeated the conversation with respect to this incident: "Negroes in the South will have to be taught the communist way of living (program which is now being carried on by the Communist Party, the C.I.O. and the *American Federation of Labor)* before they can receive fire arms in the event of *revolutionary action by the fascists* in that part of the country." [Ex. 730, R. 7444, R. 7442-3, 7446; emphasis supplied].

The witness explained that his testimony that petitioner Carlson talked about "a revolution in this country to overthrow this country by the Communist Party" was covered in the report by its reference to "revolutionary

action by the Fascists in that part of the country [the South]." He further explained that in his mind "resistance to a fascist revolution" is "similar" to "overthrow of the government of the United States" [R. 7446-50].

The witness also apparently equated capitalism and fascism, for he testified that on that occasion petitioner told him that he had been arrested some years before for "activities against the capitalistic people." The contemporaneous written report indicates that petitioner said that in 1939 he was arrested for picketing a German consulate [Ex. 730, *supra;* R. 7444; R. 6480-81; R. 7442-3, 7446]. On the same occasion, petitioner Carlson, according to the witness, instructed him to buy the Communist Manifesto [Ex. 39, R. 1352], which he described as the bible of the Party, Problems of Leninism [Ex. 146, R. 1363], Foundations of Leninism [Ex. 1, R. 1357], and the History of the C.P.S.U. [Ex. 28, R. 1362; R. 6482-4, GA 277-8]. The contemporaneous report [Ex. 730, *supra,* R. 7444] does not mention these alleged instructions or books.

The same witness testified that he attended a public social affair in 1947 where petitioner Carlson refused to give him the names of persons in attendance because some of the people "were not to be known as Communists" and "to be a true Communist, you must learn to keep certain things confidential such as their names." On this basis he reported to the F.B.I. as Communists all of the names he could obtain of those in attendance, including the name of one man he knew not to be a Communist [R. 6484-6, GA 279-80; R. 7469-76].

Another witness testified that in 1951 petitioner was at home, when his wife interrogated the witness there concerning his background and his relations with the police and F.B.I. agents [R. 2807-10, GA 90-91].

There is some evidence that petitioner, Carlson, discussed, taught and wrote on the subject of Marxism-Leninism and other subjects. In 1936 he led a discussion group in Los Angeles about building the Party press [R. 5519, GA 245-6]; he also led a study group in a park, where he "used" Lenin's "What Is To Be Done" [Ex. 266, R. 1368] and he said that "something new had happened in the world," that "we must look to Lenin for the answer . . . . in order to build our leadership among the young people and win the young people for the fight against fascism," that methods of doing this should be "dressing up the Young Communist League, opening youth centers . . . . putting on ties [and] . . . . an American front to the Young Communist League, so that people would classify us as an American organization . . . . , work in the churches, in the YWCA, and . . . . building of the youth front" [R. 5512-16, GA 244-5].

In early 1946 in San Francisco he substituted for another teacher for two sessions of a Marxist class. The record does not reveal what he taught [R. 7780-3; 7927, GA 361-2].

In June, 1946, petitioner cooperated with petitioner Yates in the preparation of a booklet entitled "Handbook for Club Officials in Outline Form" [Ex. MF, R. 11,056, R. 11,054-56]. This outline describes activities of Communist clubs indicating that the aim and purpose of such activity is to develop understanding of the need for so-

cialism and to win improvements in the conditions of workers. It urges activity on such issues as jobs and wages, fair employment practices, peace, election campaigns, etc. The methods by which these activities are to be carried on include "open meetings, state meetings, forums, leaflets and bulletins, use of Party press and literature, circulation of petitions, organization of letter-writing campaigns, organizing mass delegations around issues, organizing actions on grievances" [R. 11,057].

Sometime after the end of World War II petitioner wrote, and the Communist Party distributed, a pamphlet entitled "Let's Get Off The Dime" [Ex. FF, R. 4916]. The pamphlet dealt with the problems of reconversion as they affected the working people, the growth of unemployment after the war, the rising cost of living, and the drive against labor unions [R. 11,938-48]. It urged a strong defense of the living standards of the people, increased unemployment insurance, fair employment legislation and international collaboration for a peaceful world [R. 11,954-58]. It urged the proposition that by maintaining their trade unions strong, clean and democratic and by participating actively in the political life of their communities, the working people could most effectively protect their interests [R. 11,940-72, App. Item 36, pp. 162-7]. As for socialism, the pamphlet stated:

> "'The Communist Party recognizes that the final abolition of exploitation and oppression, of economic crisis and unemployment, of reaction and war, will be achieved only by the Socialist reorganization of society—by the common ownership and operation of the national economy under a government of the people led by the working class.' (From the Preamble to the Constitution of the Communist Party.)
>
> "That is what is called 'Socialism.'

"Only that kind of a 'reorganization of society' will put an end to a situation where, in a country like ours, one-third of the nation is 'ill-housed, ill-clothed and ill-fed.'

"Socialism is the only way out.

* * * * * * * *

"We Communists are working towards that goal. It will be realized when the decisive section of the American people line up with us. And as part of our work towards that goal we are doing everything possible now to help organize and lead the people in the fight to improve conditions under the present set-up.

"That's where we Communists stand . . . ."

Dorothy Healey Connelly.[40]

The first offices petitioner Dorothy Healey Connelly is shown to have held in the Party were those of Los Angeles County Organizational Secretary and membership on the State Board, to which positions she was elected when the Communist Party was reconstituted in 1945 [R. 3835-9, GA 124-5]. She was observed at the Party's State offices in San Francisco many times between June and December 1945 and thereafter [R. 7830-5]. She continued as County Organizational Secretary until 1949 when she became County Chairman, a position she held at the time of her indictment [Ex. 321, R. 1540; R. 3837; R. 6629-36, GA 289-92; Exs. 645, 640, 641, R. 4520; Ex. 644, R. 4521; Ex. 642, R. 4523; Ex. 643, R. 4522; R. 4519-22]. She also continued as a member of the State Board [Ex. 398, R. 3838, R. 3839-40].

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[40]Generally known and referred to as Dorothy Healey.

In 1936, petitioner attended "underground meetings"[41] of the Young Communist League in Los Angeles [R. 5976; GA 262-4]. Respondent offered no evidence as to what occurred there.

In 1945 she attended the National Convention at which the Communist Party was reconstituted [R. 2038, GA 44]. What, if anything, she heard, said or did at that convention is not disclosed. Upon her return to California she attended the State Convention at which "She spoke and said that the future of the party will be militant, we urge mass demonstrations at the City Hall, . . . Communist meetings on street corners, . . . shop gate meetings, . . . re-education of all Marxists and recruiting of trade union members, . . . picketing of the homes of Congressmen who do not vote Communist Party approved legislation . . . concentration of recruiting in the basic industries" [R. 3862-4, GA 130-1]. She also said in substance that "the labor movement was plunged into the postwar period without any planning," that "there should be a special session of the state legislature," and that "there should be a demand for severance pay to all workers who were laid off as the result of the government cancellation of the contracts." So many people at this Convention said that "the most important task facing the country was reconversion" that the witness could not remember whether this petitioner made such a statement [R. 4076-9].

In the same year, as the highest functioning officer available, she met with a group to "try to straighten out" what the witness referred to as "a party disruption with-

[41]The fact that Party meetings were illegally attacked by the police was conceded by respondent's witness [R. 5893-5901].

in our group" but the nature of which the record does not indicate [R. 3835-6, GA 124].

Later in 1945 she spoke at a Los Angeles meeting in support of a report on labor which urged that at the end of the war the unions should "reclaim their right to strike," with the proviso that strikes should "be used only as a last resort, a type of struggle that needs careful and solid preparation, that should be decided upon only when the chances of victory are reasonably good and must be guided by a sane, firm and resourceful strike strategy, such as has been taught us in the past by one of its greatest exponents and masters, Comrade Foster" [Ex. 329, R. 3926; R. 4079-81].

In 1946, she spoke at another meeting in Los Angeles at which, according to the testimony of the same witness, she said that "trade union leaders are to be Marxist-trained, that all strikes in basic industries must be Communist-led and, from time to time the County Communist Party Board should be consulted as to its progress or success of these strikes" [R. 3881-5, GA 133].

In 1947 she spoke at a Los Angeles meeting and emphasized the importance of concentrating on recruiting of industrial workers in the basic industries [R. 6859-62, GA 305-6]. The same year she also spoke in Los Angeles at a May Day meeting and at one attended by Henry Winston (alleged in the indictment to be a co-conspirator) but there is no evidence as to what was said at either meeting [Ex. 407, R. 3939; R. 1336-50, GA 31].

In 1948 she attended State Board meetings in San Francisco [R. 5447-50, GA 231]. The same year she spoke at a meeting in Los Angeles and urged the re-

registration of as many Party members and recruitment of as many new members as possible, and of labor union members with special emphasis on trade union leaders, and of factory workers and people in a position to assume leadership in the Party. She urged Party members to join Independent Progressive Party clubs and to get non-Party people to join also [R. 4979-86, GA 186-90]. She attended a meeting called for the purpose of dividing a section of the Party [R. 6629-32, GA 289-90] and a section meeting at which she was elected as a delegate to the State Convention [R. 6633-4, GA 291].

At the 1948 County Convention she gave a main report dealing with such matters as the growth of the Party and its organizational set up; she urged that socialism could be achieved "only with the working class in the leadership" and therefore proposed concentration on recruiting workers and particularly those in the industries and unions which had the most influence among workers. She also urged more activity among community groups, including particularly "in fighting against police brutality, discrimination and for civil rights for the Mexican-American people" [Ex. FO, R. 5153]. Also, in 1948 she attended a regional meeting in Los Angeles but what occurred there does not appear in the record [R. 2812-13, GA 92].

In 1949 she attended a National Committee plenum in New York and there, according to the testimony of the witness John Lautner, he demonstrated and gave her a sample of a small hand mimeograph machine designed for "underground work," in the event that the Party was outlawed, and printers refused to print any Party material, to be used in campaigns by the Party "to fight its way back to legality" [R. 2274-97, GA 64-9; R. 2547-67].

She spoke at a public Party meeting in Los Angeles in 1949, but what she said was not disclosed [R. 6633-6, GA 291-2]. In 1950 at a Los Angeles Regional meeting she spoke "against the Mundt-Ferguson bill, and she read a letter of Foster congratulating the Los Angeles Communists in their work" [R. 2815-16, GA 94]. The same year, at a "Stockholm Peace Appeal convention," she "spoke on the jailings of the Hollywood ten" [R. 2816-17, GA 94-5] and later she was present at a People's World Circulation Drive Rally [R. 2819-20, GA 95-6].

Ben Dobbs.

Petitioner Ben Dobbs was connected with the Young Communist League from 1932 to 1945 [R. 547-8, 870-2, GA 11; R. 5502-4, 6136-7]. In 1936 he was a member of the California State Central Committee of the Communist Party [Ex. 549, R. 4586, GA 458]. He registered as a Communist for voting purposes in 1938 and 1948 [Ex. 634, R. 4576, GA 456; Ex. 559, R. 4530, R. 4529, GA 452]. In 1939 he was executive secretary of the Los Angeles County Young Communist League [Ex. 611, R. 5592, R. 5591-3]. In 1945, 1946 and 1948 he was trade union director or chairman for the Party in Los Angeles [R. 548; Ex. 407, R. 3939, R. 3937-9, GA 137; R. 6629-31, GA 289-90]. In 1949, 1950 and 1951 he was the Los Angeles County Organizational Secretary [R. 3550-1, GA 108-9; R. 6636-40, GA 294; Ex. 642, R. 4523, GA 451].

Petitioner Dobbs was shown to have been present at the following meetings with respect to which there is no evidence in the record of what he said or did: a conference of the Young Communist League in 1932 [R. 5502-4]; a discussion group of that League in 1933

[R. 5505-6, GA 243]; a meeting of leaders of the same group in 1936 [R. 5526-7, GA 247]; a state meeting of the League in 1938 [R. 5543, GA 250]; between 1944 and 1948 at least fifty meetings at the State Headquarters of the Party in San Francisco [R. 7796-7, GA 368];[42] in 1946 two public meetings in Los Angeles, at one of which co-petitioner Schneiderman spoke and at another of which petitioner Yates spoke [R. 3886-3904, GA 133-6]; in 1946 at "at least a couple of county conferences" [R. 6865, GA 306-7].[43]

There were a number of meetings as to which there was some evidence concerning the nature of petitioner's activity: In 1939 he spoke at a meeting in Oakland but the witness could not recall what he said [R. 3549-51]. About 1946 he spoke at fund raising campaigns, but the record is silent as to what he said [R. 3939-40, GA 137]. He was announced as chairman of a May Day Rally in 1947 but the record furnishes no further information on this incident [Ex. 407, R. 3939, R. 3937-9].

In 1948 he spoke at a Los Angeles Party Press School and instructed those in attendance to read from pages 148-9 of the "History of the Communist Party of the

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[42]This testimony was given by the witness Van Dorn [see pp. 32-37 *supra*.] Though the witness stated she saw Dobbs more than 20 times during the latter part of 1945 and early 1946 [R. 7984], her recollection was refreshed by showing her a certified copy of the honorable Army discharge [Ex. HQ for Identification] which showed that Dobbs was inducted into the Army on April 1, 1942 and was overseas from the *5th of February, 1945 to February 26, 1946* [R. 7986]. The witness Van Dorn conceded that she could not have seen him during the period she had previously referred to in her testimony.

[43]He was also named by respondent's witness Saunders as having been present at a 1945 Party convention, when as a matter of fact he was in Europe serving in the armed forces [R. 870-5].

Soviet Union" [Ex. 28, R. 1362] dealing with the role of the Communist paper "Pravda" in Czarist Russia and during the October, 1917 revolution. The witness testified that petitioner compared the role of Pravda with the People's World and said that every club should have "organizations set up to provide as Pravda had done for the distribution of literature from hand to hand, if necessary, or in any other method that we were able to do in the event that the Communist publications themselves were no longer allowed in this country." Dobbs was also reported to have said that it was necessary to build the press so that "even if there was no outlawing of the Communist Party, that it would be granted widespread recognition and acceptance, or at least a reading, if not acceptance, by those people to whom they were able to distribute it" [R. 5010-20, GA 192-6]. All of the issues of the People's World were available and approximately 68 issues were introduced into evidence (10 by respondent[44] and 58 by petitioners).[45] There was nothing in any issue which suggested or could reasonably

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[44]Ex. 159, R. 687; Ex. 159a, R. 5302; Ex. 375, R. 2873; Exs. 707, 709, R. 5302; Ex. 710, R. 5304; Ex. 714, R. 5530; Ex. 736A, R. 8060; Ex. 737, R. 8070; Ex. 749, R. 11,599.

[45]Ex. D, R. 961; Exs. AK, AL, AM, AN, AO, AP, AQ, R. 1883; Ex. DR, R. 4120; Ex. DV, R. 4259; Ex. DJ, R. 3740; Exs. DM, DN, DP, R. 4095; Ex. DS, R. 4182; Ex. DT, R. 4223; Ex. DX, R. 4295; Exs. DY, DZ, R. 4336; Ex. EY, R. 4867; Ex. EZ, R. 4893; Exs. FA, FB, FC, FD, FE, R. 4893; Ex. FF, R. 4916; Ex. FG, R. 5095; Ex. FM, R. 5106; Exs. GJ, GK, R. 6142; Exs. GL, GM, R. 6143; Ex. GA, R. 5923; Ex. GE, R. 6027; Ex. GT, R. 6208; Ex. GY, R. 6378; Ex. GZ, R. 6394; Ex. HA, R. 6432; Ex. JM, R. 10,349; Ex. JR, R. 10,423; Ex. JS, R. 10,434; Ex. KA, R. 10,593; Exs. KD, KE, KF, R. 10,601; Ex. KH, R. 10,616; Exs. MG, MH, MI, MJ, R. 11,076; Ex. MO, R. 11,833; Ex. MP, R. 11,836; Ex. MQ, R. 11,839; Exs. MU, MV, MW, MX, R. 11,769.

be construed as suggesting the overthrow of the Government by force and violence.

Petitioner spoke at a meeting in 1948, the purpose of which was to divide a section into two parts but the record is silent as to what he said on this or any other subject [R. 6629-30, GA 9289-90]. In the same year he spoke at a "functionary meeting" in Los Angeles on the subject of the People's World; he urged support of the paper through reading it, fund donations and the obtaining of subscriptions. According to the witness petitioner stated that in the "History of the C.P.S.U." [Ex. 28, R. 1362] there is a whole chapter "devoted solely to the organization of Pravda, the Russian Newspaper"[46] which deals with both the legal and illegal existence of the paper; that Pravda was used to disseminate information and instructions and the People's World "had a similar purpose over here" [R. 4982-9, GA 186-92]. From the numerous exhibits in evidence it appears that the only "instructions" issued by the People's World related to such matters as registration and voting and support or opposition to legislative programs and policies of the executive branch of the government through the usual democratic channels such as letter writing, delegations, testifying before committees, distribution of leaflets, mass meetings, adoption of resolutions by organizations, etc. [R. 1883-6, App. Item 22, pp. 131-3; R. 4098, R. 10,350-1, App. Item 82, pp. 332-4; R. 4337, 5199-201, App. Item 27, pp. 144-5; also see n. 44, 45, *supra*].

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[46]There is no such chapter in this book, although there are a few pages (149-54) in this twelve chapter, 360 page book, dealing generally with the subject of "Pravda."

He spoke at a "functionaries" meeting in Los Angeles in 1948 but what he said does not appear [R. 5152-6]. The same year he made a report at a County Convention in which he advocated that labor should fight for wage increases, expose "profiteering," adopt a program of "unity down below," support Wallace for president, increase electoral activity in support of progressive candidates, struggle for the job and other rights within and outside of the unions of Negro and Mexican-American workers and against chauvinism and anti-Semitism, give special attention to the problems of youth, campaign to repeal the Taft-Hartley law and implement a program to increase the "working class base" of the Party [Ex. FO, R. 5153].

He was the main speaker at the 1949 Lenin Memorial meeting chaired by Steinberg, which was called to "Demonstrate for the Bill of Rights" and to protest the proscution in the *Dennis* case (p. 50, *supra*). The record is silent as to what anyone said at that meeting [R. 8066-75, GA 207-11]. Also in 1949 he chaired a public meeting at which petitioner Healey spoke [R. 6634-6, GA 291-2] and he spoke on an undisclosed subject at a meeting in Oakland on the 32nd anniversary of the Soviet Union [R. 3550-1, GA 108-9].

In 1950 he spoke at a "functionary" meeting on the Daily People's World fund and subscription drive and discussed club quotas with relation thereto [R. 6636-40, GA 292-4] and at an election rally where he supported the drive for the People's World and protested the jailing of Eugene Dennis [R. 2825-6, GA 98].

Aside from positions held by petitioner and attendance at meetings there is the following evidence relating to

him. One of petitioner Dobbs' activities was promoting a sports project on the waterfront including a place of recreation for seamen. As a representative of the Young Communist League in 1936, he attended several San Francisco waterfront Party meetings to help the project get started [R. 1231-3]. In 1950, a witness saw petitioner at petitioner's home where he had been sent to meet some other persons who would take him to a class of the Marxist Institute [R. 2822-3, GA 96-7].

Ernest Otto Fox.

In 1935 petitioner Fox was a "working organizer" for the Communist Party in Seattle [R. 544-5, GA 10]; in 1947 and 1948 he was chairman of a San Francisco Club or Branch of the Party [R. 4395; R. 6594-96, GA 285]; he then became chairman of a section, a position which he held until the latter part of 1949 when he became "waterfront organizer" [R. 6588, GA 283; R. 6611-14, GA 288] and in 1950 and 1951 he was San Francisco "Maritime Section Organizer" [Ex. 177, R. 2831; Ex. 181, R. 2832, GA 579].

When petitioner was nominated for club chairman in 1948, he was not elected because of the fear that it might "endanger" his "citizenship status." About two weeks later it was announced that "the county severely criticized the position that was taken" and that "Ernest Fox would be chairman" [R. 6593-6, GA 285].

There is evidence that in 1948 petitioner maintained a complete set of the "Little Lenin Library" in his home, which he said he had received when he was a delegate to a convention [R. 6615, GA 289].

The record shows petitioner's attendance at the following Party meetings, with respect to which there is no

other evidence: in 1936 a trade union caucus in San Francisco [R. 5539, GA 249]; between 1944 and 1948, eighty to one hundred meetings at the Party headquarters in San Francisco [R. 7787, 7792, GA 364, 366]; in 1946 an executive committee meeting of a San Francisco Club [R. 4394]; an unspecified number of state or county board meetings in San Francisco in 1948 [R. 5444-8, GA 228-31]; a convention in New York on some unspecified date [R. 6601-3].

Among the witnesses testifying concerning petitioner Fox was William M. Foard, who, as a member of the Party, was closely associated with the "leftists" who were expelled because they insisted that the Party should press for socialism now, regardless of the wishes of the majority of the American people (see pp. 40-43, *supra*). He testified to the meeting attended by petitioners Yates and Fox at which petitioner Fox stated that the time for militant action had not yet arrived [see pp. 30-31, *supra*, R. 4381-6, GA 148-50]. On another occasion, at a union meeting, the witness Foard spoke against having the union march on Labor Day, at which time petitioner Fox made a speech attacking his position. The witness "resented the underhanded way in which the motion was put to a vote" and "his [petitioner's] attack on me . . . in the presence of four or five thousand men" [R. 4720-3].

At a "section" meeting in 1948 petitioner urged "the necessity of better Communist Party organization" [R. 6590-3, GA 284-5]; on some unspecified date he attended a National Communist School at which "every security measure was taken when he arrived there" [R. 6599-6001, GA 286].

In 1950 he wrote an article entitled "Weaknesses in Our Maritime Work" which was published in a state "preconvention discussion bulletin" wherein he criticized "right opportunistic tendencies" in the maritime industry "which are expressed in resistance to developing a fight around basic political issues, underestimation of the militancy of the rank and file, and a desire to stick to simple trade union problems." He advocated the development in the maritime unions of a fight for peace and around such issues as the recognition of China and its seating in the United Nations, the collection of signatures for the Stockholm peace petition, the exposure of the Government's "screening program as part of the whole drive towards war and fascism" and as raising "the false issue of 'Communism,'" and "the struggle for Negro rights and jobs . . . against white chauvinism" and for "Negro-white" unity [Ex. 181, R. 2832, GA 579]. The article was republished in a similar bulletin circulated in 1951 [Ex. 177, R. 2831, GA 579].

Rose Chernin Kusnitz.[47]

In 1943 petitioner Chernin was Section Organizer of the Bronx Section in New York [R. 7088-9, GA 317]; in 1948 she was Organizational Secretary, 66th Assembly District, Los Angeles [Ex. 182, R. 2833, GA 581-2]; in 1949 she was, first, Section Organizer of the West Jefferson Section and later Organizational Secretary of the Midtown Division in Los Angeles [R. 7753-5, GA 356].

Petitioner is shown to have been present at the following Party meetings, where so far as the record shows, she said and did nothing: in 1945 the New York State

[47]She is generally known as Rose Chernin.

Convention [R. 2036, 2038-9, GA 45]; in 1946 one public meeting at which co-petitioner Schneiderman spoke [R. 3886-9, GA 133-5] and another at which petitioner Yates spoke [R. 3902-4, GA 135-6]. In 1950 she chaired and collected funds at a "Midtown Division Meeting" held in connection with the "People's World Fund Drive" [R. 7755-6, GA 356-7].

Prosecution witness Scarletto testified that in September 1951 he saw her at a meeting of "an organization she was the chairman of for protection of the foreign born" on "Third Street near Hill, upstairs" where "they had some discussion what they were going to do about some of the Communist members they had up for deportation or something," and that "she was organizing branches of all nationalities from the I.W.O. at that time to keep the ones that were being accused of something [the witness did not recall what] from being deported" [R. 2830-1, R. 3316-19].[48]

In 1943 she spoke at a club meeting in New York "in reference to increasing the membership of the particular club in the particular area. She said something to the effect that because of the war the women would have to take a more active role in the Party activities since the men must of necessity join the armed forces" [R. 7088-9, GA 317].[49]

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[48]The complete falsity of the testimony of Scarletto was conclusively established when the prosecution stipulated that Mrs. Kusnitz at the very time in question and during the period from July 26, 1951, until December 8, 1951, was in the Los Angeles County Jail because of her inability to raise the extremely high bail then set in this case [R. 3319].

[49]Teresa M. Scagnelli, the witness who testified to this incident, was a police officer from the City of New York who was brought by respondent from New York to Los Angeles to furnish the foregoing evidence. She gave no other testimony [R. 7087-91].

In 1948, she authored an article published by the Party's State Committee in a "Preconvention Discussion Bulletin" on the subject of "Party Building and Fight for Negro Rights" in which she related the following with respect to "her section" which was located in the 66th Assembly District in Los Angeles: the section had grown in membership despite the difficult times; prior to the last registration of members it "had not yet recovered from the revisionist period which blunted and stunned its fighting qualities"; this lack of recovery was evidenced by a failure to "carry on sufficient independent activity in its own name, in defense of the rights of the people"—such as F.E.P.C., for housing, against police brutality, against segregation and "jimcrow"; neither was it clarifying the issues, such as the meaning of the Marshall Plan or the danger of war; the section operated with large clubs of about 150 each; membership meetings were "dull" and badly attended; "educationals," sale of the press and literature and leadership were all poor; "white comrades" revealed "a concealed form of white chauvinism" by their lack of "confidence in the ability of Negro Comrades" and the failure to help them assume leadership; the foregoing problems were faced "boldly . . . in the spirit of self criticism"; the Section proceeded to develop "the independent role of the Party" by engaging in a "struggle for jobs in the Safeway Stores and Bank of America in our community," by holding open air meetings regularly, by bringing forward new leadership, by improved educationals, by visiting and reporting on activities of the Club to members and providing transportation and bringing them reading material; as a result a healthier situation developed; inactive members were brought back into activity and back dues, in some cases "token dues,"

were collected; a quota of 75 recruits was undertaken for the "Party Building Drive"; a conference of women was held at which were discussed the "high cost of living, child care and recreation centers, over-crowding of the schools and the increasing unemployment of women"; a workers' conference was held at which were discussed the "struggle" for wage increases, the Taft-Hartley Bill, the discrimination in employment against Negro workers and the necessity that white workers "conduct a struggle for the rights of their Negro fellow workers"; smaller clubs were organized resulting in "improved contact with our members"; and sales of the People's World increased. Petitioner advocated a harder fight by Party members for Negro rights, on the job and off, against restrictive covenants, more study of Negro history, improved social relationships and the affording of opportunities for leadership to "Negro comrades" [Ex. 182, R. 2833, GA 581-2].

Carl Rude Lambert.

In 1935, petitioner Lambert "was the one responsible for the security of the party"[50] and in connection therewith discussed with a witness disciplinary charges which had been brought against the witness [R. 5441-2, GA

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[50]One of the respondent's witnesses defined petitioner's functions in this regard in the following way: ". . . the only word I know is underground, that is, protecting themselves against the possibility of taps on telephone, by not meeting in the same home two or three times in a row, breaking up clubs into small mobile units, not using the telephone for conversations that concern the Communist Party, things of that sort" [R. 1331-2, GA 28]. Another witness of respondent, who testified concerning petitioner's attendance at "underground" meetings in Los Angeles, admitted that at and prior to the time of the meetings, the Los Angeles Police Department did not permit open meetings of the Party; it broke up actual or suspected Communist meetings, using tear gas, arresting persons in attendance, holding them in jail for a time and then releasing them without charges [R. 5890-7]. For further discussions of the evidence on this subject see pp. 37-38, *supra*.

249-50]. He had similar responsibilities in the period 1945 to 1950 [R. 4386-9, GA 150-2; R. 5461-70, GA 235-8; R. 1330-4, GA 27-8; R. 7617-22, GA 328-9; R. 7664-8] which in 1945 were carried out under the title "Head of the Control Commission . . . which is supposed to protect the membership from any infiltration of informers, stool-pigeons, enemies of the working class, spies, saboteurs, or what have you" [R. 556-7]. In 1939 and 1942 he was Financial Secretary of District 13 of the Party [Exs. 574, 572, R. 4501, GA 446]; in 1944, Administrative Secretary of the Party in San Francisco [Ex. 563, R. 4513, GA 448]; in 1949, California State Financial Secretary [Ex. 564, R. 4509, GA 447; Ex. 623, R. 4527, GA 451-2]; in 1944 and 1945 he had a desk at the State headquarters of the Party [R. 7787-8, GA 364].

The record shows the attendance of petitioner at the following Party meetings concerning which there is no other evidence: unspecified "underground meetings" in Los Angeles in 1936 [R. 5976-7, GA 262-3]; State and County Board meetings in San Francisco between 1944 and 1948 [R. 7771-8, GA 358-60]; in 1945 the State Convention [R. 615-6, GA 12-13]; and about two dozen meetings of the State Board between 1947 and 1949 [R. 5437-47, GA 224-30].

In 1945 he attended the "Mother Bloor" reception to which the witness Daisy Van Dorn testified (see pp. 32-36, *supra*). There is no evidence that petitioner said or did anything at the reception or that he discussed it with any one at any time [R. 7813-23, GA 369-72; R. 7989-8004, 12,113-17, 12,127, 10,841-9]. In 1946 he attended a Party meeting at which certain "leftists" were expelled because they set up their own "caucuses".

and opposed the Party's position toward the Machinists strike (see p. 30, *supra*). At this meeting as "the head of the security committee of the party . . . he spoke out against these persons and accused them of anti-party activity, of allowing rumors and stories to get into the hands of the commercial press and various anti-labor elements" [R. 4386-93, GA 150-3]. In 1947 he attended the meeting at which co-petitioner Schneiderman spoke on "left sectarianism and deviations" (see pp. 41-42, *supra*). There is no evidence that petitioner Lambert said anything [R. 4373-80, GA 144-7].

In 1947 he spoke at a club meeting on the subject of security; he related the histories of certain persons expelled from the Party and he warned the members present that there were F.B.I. plants within the Communist Party, that the F.B.I. was tapping their telephones and he believed that their mail was being tampered with; he went on to tell the members how to protect themselves from those F.B.I. informers and how to take certain precautions to keep their conversations from being picked up by wire-taps [R. 5464-70, GA 235-8].

In 1948 he attended a meeting at which petitioner Healey spoke on the subjects of recruiting and of the third party (see pp. 60-61, *supra*). It does not appear that petitioner Lambert said or did anything at this meeting [R. 4979-86, GA 186-90]. The same year he attended a County Board meeting in San Diego at which he was given "the thinking of members of the county board on the individuals involved in the factionalist movement that had arisen in the San Diego party." Petitioner is reported to have said that "it would be best to expel such people from the party, even though there might be

a possibility of their being sincere about their criticisms" [R. 1330-4, GA 27-8].

The witness Vernon Sutherland testified to two alleged incidents concerning petitioner Lambert. The witness became a member of the Communist Party in 1943 at the request of the F.B.I. and for the purpose of acting as an informer [R. 7611-15]. His pay as a beginner in this business was $25 a month but he worked his way up to $150 a month [R. 7653-7]. His total compensation for the period of seven years during which he was employed as an informer was $6,044.93 [Ex. NA, R. 12,156, 12,155-62], an average rate of over $860 a year and in excess of $70 a month. His testimony was limited to the two meetings involving petitioner Lambert.

The first meeting was that of a Party club in the Community of Chico, California, in 1949 participated in by petitioner for the purpose of settling a dispute between two members concerning union activities [R. 7615-7, GA 327].

In 1950, petitioner attended a meeting at the same club, called for the purpose of considering charges against the witness Sutherland. Specifically the witness was charged with attempting to cheat a Negro out of a piece of real estate for the sum of $250, with lying about Negroes allegedly refusing to sign certain petitions, with attempting to hire a Negro to dig a cesspool for 75 cents an hour, with carrying a gun while distributing Party leaflets and other charges that the witness could not recall. The witness asserted that the charge concerning cheating of a Negro on the sale of a house was inaccurate as to the amount involved. He stated that the charges were finally "trimmed down" to "chauvinism," which the witness understood to mean "prejudice against the Negro

people." The witness further testified that the Communist Party condemned chauvinism and that it was common practice for it to expel persons guilty thereof. He denied the gun carrying charge but admitted that, because it was believed to be true, he was severely criticized. [R. 7664-8].

At the Chico meeting considering these charges, petitioner "stated that the state board or some state officials in the state office had recommended I [the witness] be expelled." It was after this, according to the witness, that the following discussion took place: Someone inquired of petitioner as to the reason for such drastic action and petitioner replied that "they were purging the party for [*sic*] membership for emergency or revolution"; the witness claims that he then asked "Are you really planning revolution by bullets instead of ballots?" and that one, Hursel Alexander, replied "Just what the hell do you think we are purging the party for?" [R. 7617-20, GA 328-9]. In the entire record there is no intimation of "planning" of a "revolution by bullets instead of ballots," except on this one occasion in a question put by an F.B.I. informer in the process of being expelled on the charge, among others, that he carried a gun.[51] Even if such a conversation took place in Chico, California, under such unique circumstances, there is nothing in the record to indicate either that petitioner construed Alexander's question as asserting support of a "revolution by bullets" or that he approved such a view if the remark were so construed.

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[51]Under the circumstances where the witness was being "purged" for carrying a gun, the posing of the question as to the reasons for the purging seems to point to the conclusion that those who believed in violence were being cleared out of the Party precisely because it did not believe "in a revolution by bullets instead of ballots."

It should be noted that this is the only incident of any kind or character occurring during the three year period within the statute of limitations tying any petitioner in, even by mere presence, to any discussion involving the question of violent revolution.[52] As a matter of fact as to most petitioners there is no such evidence relating to any period of time.

Albert Jason Lima.

Petitioner Lima registered for voting purposes as a Communist in 1940, 1943 and 1946 [Exs. 527, 528, 537, 539, R. 4534-5, GA 452]. In 1940 and 1942 he was a member of the Party's State Central Committee [Ex. 520, R. 4587 and Ex. 553, R. 4585, GA 458]. In 1945 and 1948 he was a "field organizer" for the Party [R. 553-4, GA 12; Ex. 315, R. 6729; R. 6717, 6723, 6728-9]. From 1945 to 1948 he had office space at the Party's San Francisco offices [R. 7885-7, GA 362-4]. In 1946 and 1947 he was a member of the National Committee of the Party [Ex. 650, R. 2110-12; Ex. EA, R. 4345]. In 1947 he was the California chairman of the Party's Veterans Committee [R. 1316-18, 1327-9]. In 1950 he was chairman of the East Bay Region of the Party in California [R. 3561-2, GA 109-10] and a delegate to the State convention [R. 3668-70, GA 114].

Petitioner attended the following Party meetings with respect to which there is no evidence as to what, if anything, he said or did or the length of his presence or extent of participation; two State conventions and the National Convention in 1945 [R. 554, GA 12; R. 458-9,

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[52]Nowhere in the record is there any showing that any petitioner at any time stated a belief in violent revolution.

2034, 2037, 621-2]; the 1946 meeting at which co-petitioner Schneiderman and petitioner Lambert spoke on charges against the "leftists" (see pp. 73-74, *supra*); [R. 4386-93, GA 150-3]; the 1947 meeting at which co-petitioner Schneiderman spoke on "left sectarianism" and "right deviations" [see pp. 41-42, *supra;* R. 4376-81, GA 145-7]; between 1947 and 1949 approximately two dozen State Board meetings in San Francisco [R. 5439-49, GA 224-30]; and a veterans caucus in San Jose in 1947 [R. 1317-18, 1327-9].

In 1940, petitioner was a candidate for Congress on the Communist Party ticket [Ex. 580, R. 4559]. He was advertised as the main speaker at a Party "May Day Rally" in 1947 [Ex. EA, R. 4345]. Whether he actually spoke and if so what he said was not the subject of evidence. The same year he met with several people in San Diego and participated in a discussion which dealt with the political situation—"specifically with the need for thought in regard to the coming campaign of the Independent Progressive Party" [R. 1325-7]. In 1950 he attended the Party's West Oakland Convention, where he gave a "short talk . . . on the necessity of recruiting" [R. 3661-69, GA 110-12], and a meeting called for the purpose of electing delegates to the State Convention, where he "made a talk" the first day and on the second day was "in charge of the proceedings more or less." What he said or did is not disclosed [R. 3571-3, GA 112-3]. And he was a speaker at a meeting advertised under the slogan "No More Wars to Save Jim Crow," the record again being silent on the content of his speech [Ex. CR, R. 3700, 3749-50].

Frank Efroim Spector.

A publication of the Los Angeles Communist Party entitled "Two Decades of Progress" covering the period from 1919 to 1939 refers to petitioner Spector as a "pioneer leader of the Party in Los Angeles" [Ex. 611, R. 5592]. From 1936 to about 1940 he was San Francisco County Organizer or Secretary [R. 466-8; R. 552-3, GA 12; R. 447-50, GA 5-6]. In 1950 he was the Los Angeles County Southern Division Organizer [R. 6636-8, GA 292-3].

The following meetings were attended by petitioner, with respect to which there is no evidence as to what was said or done: in 1935 a number of Young Communist League State Committee Conferences [R. 5508-11]; Party "underground" meetings in 1936 [R. 5976-7, GA 262-3]; in 1945 a club meeting of the Communist Political Association [R. 6865, GA 307].

Petitioner was in Moscow in 1935, but there was no evidence allowed to stand in the record to indicate anything that he did or said there [R. 7684-8, GA 332]. In the same year he spoke at a San Francisco meeting of the State Committee of the Young Communist League. The record is silent on what he said [R. 5508-9, GA 243-4]. In 1937 he attended two meetings of District 13 of the Party. At one there was severe criticism of the "Western Worker" for publishing a "Trotskyite" editorial concerning "the Minneapolis teamsters' strike" [R. 447-50, GA 5-6]. At the other an outline, reading material, curriculum and recommendations for financing of a Party school were approved. No details of what was said appear in the record [R. 463, 477-80].

In 1940 or 1941 he objected to the Party barring aliens from membership and asserted that he would fight for his right to remain a member [R. 2039-43, GA 45-6]. In 1946 he attended a public meeting at which petitioner Yates spoke on foreign affairs [p. 31, *supra;* R. 4334-8; 3902-4, GA 135-6].

The witness Samuel Davenport Russell, who testified to incidents involving the petitioner Spector, joined the Party as a paid F.B.I. informer in May, 1945 [R. 6825-7]. From June, 1945 until, after September, 1947 when he lost his job with the F.B.I. he had no other employment than that of an informer and it was his sole source of income [R. 7000-1]. His initial compensation was five dollars a month but he was given successive raises until his earnings were ninety dollars a month. When he received increases he "was commended for turning in fairly good reports" [R. 6968-9]. His total compensation from 1945 to 1947 was $1,669.94 [Ex. NA, R. 12,156, 12,155-62]. For this compensation his work consisted of the turning in of names of people with whom he pretended to be friendly, of literature which he obtained in the Party and of numerous oral and written reports. He kept copies of the reports, in violation of instructions from the F.B.I. because he thought that he might write a book and he hoped to make money out of it [R. 6523, 6972-6, 6981-91, 6998-9, 7037-8].[53]

According to the witness Russell, in 1945 and 1946 petitioner conducted classes at a Party club. At one of these classes he assigned for reading the chapter called

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[53]At this time the witness was interested in the field of fantasy in literature and was a member of the "L. A. Science Fantasy Society" [R. 6991-3].

"The Party" in "Foundations of Leninism" by Stalin [Ex. 1, R. 1357] and the pamphlets "Mastering Bolshevism" by Stalin and "The United Front Against Fascism" by Dimitroff [Ex. 119, R. 660]. The witness "recalled" in May of 1952 the exact pages of "Foundations of Leninism" to which petitioner had referred in 1946 and the respondent read to the jury portions of those pages dealing with the writings of Lenin relating to the "Russian Revolution." The reading selected by the respondent stated that "Lenin restored the revolutionary content of Marxism, which had been immured by the opportunists of the Second International"; that "he also took a step forward, developing Marxism further, under the *new conditions*[54] of capitalism"; that "Leninism is the theory and tactics of the proletarian revolution . . . and . . . of the dictatorship of the proletariat"; that Lenin "pursued his activities in the period of developed imperialism, in the period of the unfolding proletarian revolution"; and that "Leninism emerged from the proletarian revolution, the imprint of which it cannot but bear" [R. 6865-72; R. 6882-92; R. 3887-3902, GA 135-6]. The witness did not testify that in referring to this reading material or otherwise, the petitioner said anything about the overthrow of our Government by force and violence. The record is completely silent as to what he did teach or advocate, aside from what the respondent would infer from the assignment of reading material. On this score, "The United Front Against Fascism" [Ex. 119, R. 660], which according to the witness was assigned for reading at the same time as the work last cited, was written in

[54]Emphasis supplied. Note this phrase in connection with the over-all reading assignment allegedly given by petitioner.

1935, eleven years after "Foundations of Leninism" was written. The Dimitroff pamphlet dealt specifically with a program for the United States, under the "new conditions" which had developed since 1924 when Stalin set forth certain general theories which he deduced from conditions as they had changed between the period of the writings of Marx and Engels and the time of Lenin's writings.[55]

The action proposed in the 1935 writing for the United States consisted of finding "ways and suitable forms of preventing fascism from winning over the broad discontented masses of the toilers," requiring for this purpose the formation of a new anti-fascist party, in the nature of a Farmer-Labor Party which, while it would be neither Socialist nor Communist, would not be anti-Communist, with a program "directed against the banks, trusts and monopolies" and for "genuine social legislation," unemployment insurance, "land for the white and black sharecroppers," cancellation of sharecroppers' and farmers' indebtedness, "equal status of the Negroes," the demands of the war veterans, and for the interests of the members of the liberal professions, the small business men, the artisans. And so on.

> "It goes without saying that such a party will fight for the election of its own candidates to local offices, to the state legislatures, to the House of Representatives and the Senate" [Ex. 119, p. 40, R. 663-5].

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[55]The witness testified that specifically referred to by petitioner were various pages of "Foundations of Leninism" between pages 10 and 33. At page 24 appears the statement that "theory is not a dogma" and that it "undergoes final formulation" only after it is "tested by the data of practice" [Ex. 1, p. 24, R. 3969].

In September 1947, the petitioner visited the witness Russell at his home and told him he was suspected "of being a police spy." The petitioner questioned Russell as to his reasons for joining the Party, his source of income, whether he had had conversations with any police agency, and what Marxist books he had read. In his answer Russell enumerated several Marxist-Leninist works and then petitioner is alleged to have said to him "that this indicated a remarkably small amount of reading for the educational director of a club" (a position held by Russell); that such a person should "be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members"[56] and that the small amount of reading he had done "was a suspicious circumstance." Petitioner, with the permission of Russell, then searched Russell's wallet and room, and he found the copies of the F.B.I. reports and notes which the witness had retained for use in his anticipated literary efforts. Russell was told to attend no more Party meetings and his career as an informer ended [R. 6910-16, GA 310-12].

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[56]That Marxism-Leninism was differently interpreted by different members of the Party is clear. The record is replete with evidence of differences of opinion within the Party on matters of both theory and practice [R. 4732-4, App. Item 39, pp. 175-6; R. 974; R. 4823-5, App. Item 40, pp. 176-7; R. 4426, 6775-7, 4155; R. 4912-5, App. Item 41, pp. 177-80; R. 2573]. The possibility of interpreting Marxist-Leninist writings differently dependent on how it is studied was also acknowledged by one of respondent's witnesses [R. 2657-62, App. Item 55, pp. 224-6]. There is no evidence that this petitioner, or any other petitioner for that matter, ever advocated or taught that the Government of the United States should be overthrown by force or violence or construed Marxism-Leninism as calling for such advocacy.

In 1949 it was announced that petitioner would teach a class on "The State" at a County "Section Leadership Training School." Whether he did so does not appear from the record [R. 6664-7, GA 297]. The same year he attended a public Party meeting at which petitioner Dobbs was the chairman and petitioner Healey spoke [see p. 66, *supra*, R. 6634-6, GA 291-2]. In 1950 he made a speech at a "functionaries" meeting in Los Angeles in which he said that there was a nationwide peace campaign and that the Communist Party had a quota of 500,000 signatures on the Stockholm Peace Pledge. He pledged 500 signatures himself and said mothers could sign for children. At that meeting the matter of a People's World drive for subscriptions and contributions was also discussed [R. 6336-40, GA 292-4].

Also in 1950 he was the author of an article in a State "preconvention bulletin." In this article entitled "On 'Subjective Reactions' and 'Political Vacations' Among Left Progressives and Trade Unionists," he criticized certain "left-progressives" for taking a "political vacation" after their International Union removed the local union's "progressive leadership." He said that because of this the employers "went on a rampage, cutting piecework prices and hourly wages and undermining conditions won over many years of struggle under progressive leadership." He said the effect of this was "to weaken the unions, destroy their fighting capacity, and chain them to the imperialists' policies of war abroad and fascism at home." The remedy recommended by him against these evils was for "left-progressives" to engage in "greater activities in the shops and unions around each demand" [Ex. 181, p. 3, R. 2832].

Loretta Starvus Stack.

In 1945 she was a delegate to the National Convention of the Communist Party [R. 2035; R. 2062, 2431-5, GA 72-3] and later that year was elected to the California State Committee [Ex. 398, R. 3836-9, GA 124-5]. From 1945 to 1948 she had office space at the Party headquarters in San Francisco [R. 7785-8, GA 364-5]. From 1945 to 1949 she was State Secretary or Organizational Secretary [Ex. 566, R. 4507; Ex. 561, R. 4509; Ex. 569, R. 4509; Ex. 564, R. 4509; Ex. 562, R. 4514; Ex. 570, R. 4517; Ex. 582, R. 4517; Ex. 576, R. 4524; Ex. 577, R. 4525; R. 1234; R. 5476-7, GA 238]. In 1946 she registered to vote as a Communist [Ex. 533, R. 4534]. In 1950 she was a member of the State Committee [R. 11,626, GA 418].

The record discloses that petitioner attended the following Party meetings but does not indicate that she said or did anything at them: a State Convention in June of 1945 [R. 3854; R. 621-2]; many meetings of "functionaries" in 1945 [R. 3946]; from 1947 to 1949, meetings of the State Board [R. 5439-46, GA 225-30].

The witness Leonard Patterson went back twenty years in his testimony concerning Loretta Stack. The witness testified that he became a Communist after he got a job "in the Communist Party headquarters, in the barber shop." He was "a very religious fellow" and didn't want to become a Communist because he thought "that Communism was red and wanted to overthrow the government." However, on a bet that if he took a beginners course in the Workers School he would not become a Communist, he took the course and lost the bet because the schooling convinced him he "ought to be a Communist" [R. 5724-5].

At the time of trial he had begun a career as a professional witness. He had testified for the respondent in about 10 cases as of that time and in several state cases at a fee of $25 per day plus $9 for subsistence plus traveling expenses [R. 5623-8].[57] When he worked for the Communist Party he received "from $5 to $15 a week" [R. 5634]. In 1942 he went to work for a government navy yard and in response to a question on the application blank as to his former employment, he did not mention his work for the Party [R. 5677-88].

The witness first talked to a representative of the F.B.I. before 1950, but he couldn't recall what year it was [R. 5648-9]. This witness "identified" petitioner as one Lottie Keith whom the witness testified he knew in 1932 [R. 5354-57]. The witness said he met Lottie Keith in 1932 when he came back from Russia "together with other young Communist League students that was going over to Russia to the International Lenin School" and that he gave "them a pep talk on what they should expect in the Lenin School" [R. 5359-63, GA 215; R. 5738].

The witness said he had a conversation with Lottie Keith in Philadelphia in 1934 concerning the Lenin School; they discussed having been "taught" street fighting and the use of automobiles and street cars as barricades "to protect the revolutionaries in their fighting" [R. 5372; R. 5760]. They also discussed "illegal work."

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[57]His expectation that he would get further employment in this field was indicated by his refusal to give a specific answer to a question because "I don't want to make a positive statement yes or no. This will bounce back some other time" [R. 5746-7].

She told him that she had learned that the duty of students on their return to the United States was to stay "legal" as long as they could; but that on an attempt of the United States Government to drive the Party underground, "the Party apparatus would be kept intact and it would function right along" [R. 5376]. The witness told Lottie Keith they would have alternate central, district and county committees in case one "gets locked up." They also discussed the use of other organizations "as a front for the Party" for functioning in time of "illegality or semi-illegality." Lottie Keith told the witness that she was taught that the dictatorship of the proletariat could come about only as a result of the overthrow of government in the respective countries; that the duty of the students was to work to overthrow their own government and to set up the dictatorship of the proletariat "as a guarantee that the government that was overthrown would not regain its power"; that all her instructors were Russian except one Britain and one American, a member of the "Central Control Commission" of the American Communist Party [R. 5363-83, GA 213-19; R. 5760-61, GA 222-3].

According to the witness, Lottie Keith then told him "that she had learned a lot from that teaching and that it was necessary in the Philadelphia district that we should start steps to put this into practice"; they then discussed "how to apply the Lenin activities to the Young Communist League" [R. 5380, 5757]. Although the witness remained in the Philadelphia district until 1937, when he "went out of the party" and during that period he "was associated with the Young Communist League, quite frequently with Lottie and her husband" [R. 5386] there

is not one word of evidence to show anything done to implement these alleged teachings.[58]

Nor is there any other evidence relating to petitioner after 1934 until the year 1945. In that year at a State Convention she made a speech in which she said "that the American workers will be the grave diggers of the capitalistic government, and she urged Marxist-Leninist rules, reinstitute them all over [*sic*]". [R. 3860-2, GA 130]. At a convention in 1946 she said that "we, speaking of the Communist Party, are the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form set up" [R. 1339-41, GA 29-30]. The same year at a County Conference in Los Angeles in a speech, "she mentioned the poor housing conditions that she had to live under as an example of the sort of things one had to endure under capitalism; and said that these experiences should spur us into working for socialism in our time in the United States" [R. 6862-3, GA 306]. Also in 1946 she spoke at a San Diego meeting of "leading people" from the county on the topic; "reorganization and concentration of the party" [R. 1342].

Timothy Evans testified for respondent concerning petitioner Stack. In February of 1948 he started work-

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[58]Although the witness left the Communist Party in 1937 [R. 5648] and first became available to prosecuting agencies in 1947 [R. 5644], he never discussed this conversation with anyone between March, 1934, and January, 1952 [R. 5763], nor had he ever made any record of it [R. 5759].

ing for the State of California. At the same time his wife obtained employment with the Veteran's Administration. At the same time he was hired as an informer by the F.B.I. [R. 3661-7]. His beginner's rate of pay as an informer was $10 a month and it rose to $125 a month plus reimbursement for any substantial expenditures. For the period from February 1948 to the time of his testimony in March of 1952 he received a total of $4,086.68 as compensation for his services as an informer, an average of about $85 a month. He reported none of these earnings on his income tax returns [R. 3634-44; R. 3672-3; Ex. NA, R. 12,156; R. 12,155-62].

This witness testified that in October of 1948 speaking at a meeting, which was not a Party club meeting, in a private home in Oakland on the "woman's question" she said in "effect" that the Party "should take precedence over the family life"; that "under our society women, and particularly working women, find themselves in a very hard and difficult position"; that they are the subject of "double exploitation," as women and as workers; that Negro women were triply exploited because of the fact that they were also Negroes; that there should be equality of women and that the discrimination against Negro women, as Negroes must also be ended, that the only ultimate solution to these problems was the establishment of socialism because the exploitation of women had economic roots in capitalism; that women in this country "must take the same historic role that women played in Russia in bringing about the revolution"; that

"the exoneration of the women would only be brought about through . . . the overthrowing of the present existing economic system, not in part, but in its entirety"; that the women if necessary should make their household activities secondary and that they "should take up the necessary arms side by side with men and bring about this change so vastly needed in the government, and bring about the dawn of socialism"; that in Russia "'love of family' is not existent"; that children are well cared for "in centers" there while "the mother takes her role side by side with men" and at the end of the work day the mother gets to spend time with her child; that while socialism is the final solution to the problem of women, she was interested in taking immediate steps to eliminate or ease the conditions of women through the fight against discrimination; that it was important to do everything possible to solve the problems of women now as they arose from day to day; and that women would learn from their own experience that socialism was the answer to their problem [R. 3530-2, GA 105-7; R. 3706-19, GA 117-19].

Petitioner Yates testified that during the five year period between 1947 and 1952 she had seen petitioner Stack "quite often" but because petitioner Stack "has been working on a job at very difficult hours" it was not as often as she would have liked [R. 11,252, GA 396].

There is no evidence of any kind as to what petitioner Stack said or did within the three year period within the statute of limitations, December 21, 1948 to December 21, 1951.

Respondent's Theory—The inferences predicated upon respondent's construction of the doctrines of Marxism-Leninism.

There is no evidence of any petitioner's alleged connection with or participation in a conspiracy as charged, unless the foregoing constitutes such evidence. Nor is there any other evidence from which the issue of specific intent of each petitioner can be determined. There was no witness, like the witness Budenz in the *Dennis* case (183 F. 2d 201, 229, 232, C. A. 2, 1950), who testified that the words appearing in any document had for the defendants on trial any hidden meaning espousing force. The activities and views of each petitioner, thus fully set forth above, is the sole evidence of their adoption and construction of Marxism-Leninism and of their understanding of the purposes and objectives of the Communist Party.

Respondent introduced numerous Marxist-Leninist writings, upon proof that each of them at one time or another was circulated, read, referred to in educational outlines or assigned for reading in some division or other of the Party. Essentially the record on this aspect of respondent's case is made up of short excerpts from about a dozen books, which are themselves historical, philosophical and polemical, dealing with the nature of societies and their history from at least 1848 to the present day, written by various authors, a number of whom passed away before the dawn of the Twentieth Century.

The respondent agreed that there was "no charge here that the printing of any of the documents in evidence is illegal in and of itself" [R. 1448-50]. It was stipulated that the Communist Manifesto [Ex. 39, R. 1352], (re-

ferred to by one of respondent's witnesses as the "Party's Bible," see p. 55, *supra*), "has been published in practically every language in the world" [R. 2610-11]. The respondent did not contend that the selling of any of these books was illegal; "we know that they are being found in libraries" [R. 3463-64]. Relying upon the passages selected by it from these writings and read into the record, respondent placed its construction upon Marxism-Leninism as advocating the overthrow of the Government of the United States by force and violence, and urged the jury and the courts below to find in accordance therewith.

Upon proof that the Communist Party is founded upon the principles of Marxism-Leninism and that petitioners were members of the Party, respondent has contended throughout that it has established each petitioner's adherence to Marxism-Leninism as construed by it, *i.e.*, to mean the forceful overthrow of our Government. Petitioners have urged at all stages of the case that respondent's construction of these doctrines is immaterial and that the prosecution had the burden of proving as to each petitioner, among other things, his adherence to the doctrine of the forceful overthrow of our Government; if that ultimate fact is to be established by showing a petitioner's adherence to Marxism-Leninism, then an essential link in the chain of proof is evidence that *he, not the respondent*, construed these doctrines as embodying the forbidden doctrine.

Moreover, respondent's theory is predicated upon the proposition that by virtue of their membership and offices in the Communist Party, every petitioner knew that the Communist Party does in fact follow respondent's inter-

pretation of Marxism-Leninism and concurs therein. But the record is replete with evidence showing, as a minimum, that a belief to the contrary is clearly tenable.

Its Constitution avows the Party's adherence to Marxism-Leninism and announces its role as spokesman for the working class and its allies in the fight against capitalism. It identifies the Party's cause with the defense of American democracy and the extension of constitutional safeguards to minorities. Socialism is proclaimed as the ultimate answer to the ills of capitalism and the Party dedicates itself to educating "the working class, in the course of its day to day struggles, for its historic mission, the establishment of Socialism" to be achieved. "by the free choice of the majority of the American people" [Ex. 21, R. 1518; R. 5114-16, R. 10,568-9, App. Item 14, pp. 114-116]. It provides for the expulsion of any member advocating force and violence (see p. 47, *supra*).

It appears without contradiction from the testimony of respondent's witnesses that this Constitution "was handed to every Communist member" when he "entered the Party"; applications for membership had the preamble to the Constitution printed on them and the Constitution was generally distributed to the members of the organization [R. 4925-6; R. 5091; R. 1710; R. 1517].

Aside from the Constitution, there is evidence of other official statements of the Communist Party eschewing the use of force and violence [R. 1161; Ex. FG, R. 5095; R. 5121-5; Ex. KI, R. 10,622, R. 10,621-3].

The basic policy resolution, adopted at the convention in 1945 at which the Communist Party was reconstituted

and thereafter published in Political Affairs,[59] defines the issue then facing the nation, not as the choice between socialism and capitalism, but rather whether democracy and peace will prevail against fascism and war. It advocates the widest democratic coalition behind a program designed to assure democracy and peace. A program to ensure a durable peace and preserve friendship and cooperation with the Soviet Union, eliminate discrimination of all kinds based upon race, color, creed and national origin, preserve and extend the rights of labor to organize and bargain collectively and protect the economic security of the people was advanced as one to meet the "urgent immediate practical needs" of the "working class and the people as a whole." At the same time the Party recognized that the American people do not yet accept socialism "as an ultimate goal." It resolved to carry on and promote an educational process, growing out of the effort to achieve solutions to "immediate practical needs," whereby the great majority of the American people would recognize the "need for the eventual reorganization of society along socialist lines" [R. 2458-72; Ex. 55, R. 1582; R. 1928-9, App. Item 15, pp. 116-117].

The official utterances of the Party repeatedly declare that socialism will be achieved in the United States only when the majority of the people desire it and then through democratic channels. There are frequent official statements to the effect that in the United States the transition to socialism will proceed along the special paths deter-

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[59]The witness Lautner, one of respondent's informers, testified that the Party's resolutions embodied its program and were "the tools to carry out and bring closer the realization of the basic aims of the Communist Party" [R. 2677]. He also acknowledged that the periodical called "Political Affairs" is a "good place to look for" the true program of the organization [R. 2673].

mined by the democratic choice of the people of this country and not by the methods followed in any other—"not by a mapped-out route, not exactly as in the Soviet Union, but by its own road, dependent on its historical, national, social and cultural circumstances" [Ex. BC, R. 2666, R. 2671; Ex. 83, R. 1582; R. 1936; Ex. 150, R. 1582; R. 1941; Ex. EU, R. 4853-4, App. Item 16, pp. 117-18; Ex. BB, R. 2666-8].

The tenable view that the Communist Party was not an advocate of force and violence is fortified by the testimony of respondent's own witnesses indicating that while they were Party members, this was their understanding. A number of these witnesses testified that as Communists they were taught and understood that the Party sought to work for the immediate improvement of conditions under capitalism and conceived of the road to socialism as requiring the winning of the majority to that objective and as necessarily following a different route than it had elsewhere [R. 1799; R. 6253; R. 1760; R. 4900-3, App. Item 18, pp. 123-5]. One such witness testified that while he was in the Communist Party he believed in the establishment of socialism for the United States; that when the people were, in a great majority, ready for socialism it was quite possible that it might be established without any violence; that there was more than a 75% chance of and he hoped 100% for such peaceful change; that if violence came it would be instigated by a minority seeking to retain power against the wishes of the majority. Many Party leaders told him that they believed these things too [R. 8542-50, App. Item 17, pp. 118-122].

In the entire record there is no declaration of the Communist Party proposing the overthrow of the Gov-

ernment of the United States by force and violence or the advocacy of that doctrine.[60] On the other hand there is a wealth of evidence, aside from the activities of petitioners discussed *supra*, which establishes that the Party continuously worked for legitimate objectives through the democratic processes. It participated as a political party in the electoral process [R. 623, R. 1160; R. 4585; Ex. 557, R. 4581-2; Ex. 555, R. 4584; Ex. 553, R. 4585; Ex. 549, R. 4586; Ex. 544, R. 4587; Ex. 520, R. 4587, GA 458]. It ran numerous candidates for public office [Ex. 580, R. 4559, GA 455; Ex. 634, R. 4576; Ex. 633, R. 4577, GA 456; Ex. 632, R. 4577; Ex. 578, R. 4579; Ex. 543, R. 4579; Ex. 526, R. 4580; Ex. 519, R. 4580, GA 457; R. 886; Ex. 199, R. 3560-1, App. Item 21, pp. 130-1; R. 1706-7; R. 961-2; R. 1348; R. 1692-3; R. 5528-9; R. 2369]. It supported candidates of other parties and consistently urged voters to exercise their franchise [R. 4159-63; R. 1883-7, App. Item 22, pp. 131-3]. It continuously developed and supported legislative programs dealing with the major problems of the times [Ex. 538, R. 4588; Ex. H, R. 1142-54, App. Item 23, pp. 133-7; Ex. I, R. 1158-9, App. Item 24, pp. 137-8; Ex. DX, R. 4295, R. 4296-4300, App. Item 25, pp. 138-42]. It called upon voters to determine their choice of candidates on the basis of the candidates' positions on such issues as peaceful world relations, defense of the Bill of Rights and of the rights of labor, the Negro people, the small taxpayers, the veterans and the farmers [Ex. 359, R. 2846; R. 3308-10, App. Item 26, pp. 142-4]. It

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[60]Of course, respondent has always contended that the Party's adherence to Marxism-Leninism constitutes such advocacy or agreement to advocate. But this argument rests upon the respondent's construction of Marxism-Leninism, not upon that of the Party, as shown in the record here.

advocated a program of friendship between the United States and the Soviet Union and the peaceful settlement by negotiations of all international problems, taking the position that "the struggle for peace is inseparable from the struggle for democracy" and that war and fascism could and should be blocked [Ex. FM, R. 5106; R. 5260; Ex. MN, R. 11,823, R. 11,834; R. 3255-6; R. 4337; R. 5199; R. 5201; R. 11,847-8, App. Item 27, pp. 144-6]. It urged labor unity and opposed the Taft-Hartley law [Ex. EA, R. 4345; R. 4350; Ex. AQ, R. 1883, App. Item 22, pp. 131-2]. It proposed a tax, unemployment compensation and housing and slum clearance program as a means of dealing with unemployment [R. 6815-18, App. Item 28, pp. 146-8; R. 1656-7]. One of its basic activities was the fight against discrimination [R. 3674, 3677-8, 3689-90, 3692-6, 3703, App. Item 97, pp. 362-8; Ex. EF, R. 4618-23, 10,607-10, App. Item 29, pp. 148-50; R. 1645-6; R. 1778-80, App. Item 30, pp. 150-3]. It concerned itself with a multitude of other problems relating to veterans' affairs [R. 1904-05, App. Item 31, pp. 153-154], foreign affairs [R. 5201; R. 5196-7, R. 1878-81, App. Item 32, pp. 154-157; see also App. Item 27, pp. 144-146], civil liberties [R. 1854-5, App. Item 33, pp. 157-159], public health [R. 1667, App. Item 34, pp. 159-160], education [R. 1708; R. 3283-5, App. Item 35, pp. 160-162], and sought their solution within our present democratic framework. It repeatedly announced its support of these democratic processes and its determination to help "curb the monopolies and check and defeat pro-fascist reaction" [Ex. EU, R. 4853; Ex. EY, R. 4867; R. 4669-70].

Respondent sought to buttress its construction of Marxism-Leninism by evidence of third party declarations

allegedly made at various Party clubs and schools—all outside of the presence and without the knowledge or approval of any petitioner. Nevertheless respondent seeks to hold petitioners responsible for these declarations. It does so in the face of uncontradicted evidence of frequent disagreements among Party members[61] with respect to the meaning both of Marxism-Leninism and of Party policies and programs (see footnote 56, p. 83, *supra*). An example of the nature of such disagreements can be found in the testimony of respondent's witness Foard who had aligned himself with the "leftists" who were expelled because, among other things, they insisted upon a program calling for socialism without regard to the wishes of the majority of the people (see pp. 41-43, *supra*). He related a discussion at a meeting of the Party club to which he and some of the "leftists" belonged at which some of the members disagreed with Foster's thesis that when the majority of the people wanted socialism, it could be achieved peacefully; that under the conditions existing in the United States a socialist revolution might be accomplished without the minority bringing about violence in an attempt to prevent the revolutionary change desired by the majority. There were others in the club who supported Foster's prediction of the possibility of a peaceful revolution [R. 4912-15, App. Item 41, pp. 177-80].[62] It has been the contention of petitioners at all times that the views of these "leftists," and others

[61]Moreover, it is not known whether the third party declarants were bona fide Party members or FBI agents, for the agents were unknown to each other [R. 6754-64, 7598-9].

[62]The same witness testified to other discussions at the same club at which the policy of the Party was criticized and at which many of the statements made were "mostly in jest"; he stated that when one of the books studied by the group referred to the revolutionary overthrow of Louis Bonaparte without violence—

allegedly making similar statements[63] could not be transplanted to any of them; that their understanding must be determined from their conduct as established in the record. Officials of the Party were not advised of what was said at various club meetings, schools or classes and they frequently disagreed with statements of which they were aware. Petitioner Yates specifically disagreed with various statements attributed to third party declarants when the alleged statements were directed to her attention during her testimony [R. 1111-20, 1136-53, App. Item 79, pp. 306-27].

"without lifting a finger"—he labelled it "merely a statement" because he decided for himself what parts of Marxism-Leninism are true and what parts are false; he conceded that the Communist Party took the position that in order to achieve the power of the state, it had to first win the majority to its side [R. 4425-8; R. 4438-40; R. 4446-7; R. 4474-5; R. 4749; R. 4781-4822, App. Item 46, pp. 188-205; R. 4900-03, App. Item 18, pp. 123-5].

[63]Such similar third party declarations included some relating to what was allegedly taught at a State Party school in 1937, by the witness Saunders [R. 1258], who conceded that when he taught schools, he received no instructions on the conduct of the schools [R. 562-3, App. Item 43, p. 184] and who left the Party in 1945 because it engaged in "endless talk of united front" instead of "talk for overthrow of the government, which I [the witness] certainly believed in" [R. 974-7, App. Item 42, pp. 180-3]; relating to what was allegedly taught at a New York Party school in 1939, by the witness Rosser [R. 5494-7, App. Item 44, pp. 184-6]; relating to what was allegedly taught at another New York school in 1941, by the witness Lautner [R. 2172, 2625, 2669]; relating to what was allegedly taught in a San Diego school in 1945, by the witness Hamlin who conceded that the outline used in the class set forth as the Party's aim "the establishment of socialism by the free choice of a majority of the American people," with which proposition one of the members of the class, expressing his own personal belief, disagreed [Ex. 626, R. 1435; R. 1784-92, 1948-9 1957-9, App. Item 45, pp. 186-8]; relating to what was allegedly taught at a Los Angeles club class in 1946, by the witness Wereb [R. 3906]; relating to what was allegedly said in 1947 at a Los Angeles club meeting and class and in 1949 at a club meeting, by the witness Litt [R. 4953-60, 4938-47]; relating to what was allegedly taught at a Los Angeles Marxist Institute in 1949, by the witness Evans, at which Institute the outline used specifically disavowed the aim of the forceful overthrow of the Government [Ex. 201, R. 2751; R. 3722-7; R. 3056-7].

Nature and character of respondent's witnesses as related to "solidity" of evidence and to requested instruction regarding consideration of informers' Testimony.

The witnesses who testified to the third party declarations as well as concerning the petitioners themselves fall into two categories, paid informers (see pp. 32, 52, 75, 80, 88, *supra*) and former members of the Party who had left it because of their disagreements with it, some of whom became professional government witnesses and consultants, an occupation which paid well (see pp. 40, 70, 85, *supra*). The witness John Lautner was expelled from the Party in 1950 at a time when he was a paid official earning $60 a week. For the next eight months he was unemployed. Then he volunteered to give information to the F.B.I. He was then hired from time to time as a "consultant" on communism and as a witness, compensated at the rate of $20 a day when he was employed by the F.B.I. and $25 when his employer was the Department of Justice. From this employment he earned $753.15 in 1951 and $3,046.55 during the first six months of 1952 [R. 2408-20; Ex. NA, R. 12,156; R. 12,155-62]. At the time he testified he had not yet made up his mind about writing a book, although he thought it a good idea [R. 2427; R. 2521-4]. The witness Honig had testified in about six or seven cases. His going rate was $25 a day [R. 8116-17; R. 8323-7].

The informers who became members of the F.B.I. at its instigation were all paid for their services (see pp. 32, 52, 75, 80, 88, *supra*). Lloyd Hamlin received $200 a month "in the form of an expense account" from 1945 until about the beginning of 1947 when he received a $50 monthly increase; he was paid $250 a month until the

time he testified in February of 1952 although he ceased functioning as a Party member in the Spring of 1951. His earnings from the F.B.I. which totalled $13,182.00 were his major source of income for the seven year period before he testified [R. 1612-19; R. 1661-7; R. 1826-8; Ex. NA, R. 12,155-62]. The informer Scarletto testified that he received $20 a month for a number of months during 1947 while he was seeking membership in the Party and that he was increased to $75.00 a month in 1951 [R. 2739; R. 3120; R. 3311-15], but it was stipulated that he was paid a total of $3,865.00—$190 in 1947, $525 in 1948, $940 in 1949, $1125 in 1950, $875 in 1951 and $210 up to the time he testified in March of 1952 [Ex. NA, R. 12,155-62].

The witness Wereb testified that he received from $25 to $125 a month (which he did not set forth in his tax returns), as reimbursement for expenses, which included "anonymous contributions" running as high as $75 made by him to the Party [R. 4018-20; R. 4024; R. 4048-9]. It was stipulated that from 1944 when he joined the Party until 1947 when he dropped out, he received $3,254, his best year being 1946 when the amount was $1,050 [Ex. NA, R. 12,155-62]. The witness Litt received his itemized expenses at first, then a flat sum of $10 a month with progressive raises to $60 a month [R. 5042-3]. The witness Lancaster testified that for his services as an informer he received $25 a month beginning in 1947 with an increase to $40 a month in 1949 which rate of pay continued until he left the Party [R. 6748-50]. However, it was stipulated that he received as such compensation a total of $3,205; $250 in 1947, $670 in 1948, $945 in 1949, $1,155 in 1950 and $80 for his services in January, 1951 [Ex. NA, R.

12,155-62]. The witness Margaret Ames and her husband were both employed as informers and each received compensation beginning at $25 a month and rising to $60 a month. Their combined total compensation was $4,-591.94 [R. 7545-55; Ex. NA, R. 12,155-62].

With respect to certain of the respondent's witnesses there are striking relationships between the time when they became witnesses and other events. The witness Saunders, because of his former Party membership, was "screened" in 1948 by the Coast Guard and prevented from following his regular occupation as a seaman. In 1951 he went to the F.B.I. and "volunteered" to become a witness in this case; about the same time he was cleared by the Coast Guard and permitted to return to his work after a hearing at which neither he nor anyone else testified on his behalf [R. 807-9, R. 819-32, R. 852-5]. The witness Honig testified that when he was first contacted by the F.B.I. he refused to talk about his activities. His testimony as to just when he was first contacted and when he decided to "cooperate" has been different in the various cases in which he has testified [R. 8119-46]. However, it is clear that shortly before his change of heart, he was arrested on a shoplifting charge, which he asserted was all a mistake, but the charge was dropped and his fingerprint records were destroyed [R. 8146-67; R. 8198-8200].

The informers hired by the F.B.I. did not become students of Marxism-Leninism; they had little or no interest in that subject or in the study of fascism; they learned as little as they possibly could and still remain members of the Party, and thus continue to hold down their jobs with the F.B.I. [see pp. 41, 52, *supra*] [R. 1519; R. 1640; R. 1910-26; R. 3143-4; R. 4082; R.

4140-1; R. 5251-4; R. 6997-9; R. 7555-9]. As one such witness put it, "I never knew and I still don't know a darn thing about Marxism-Leninism and I pray God I never do" [R. 4188-9] and he was only interested in the safety of the United States so he "never listened very much unless some one particular person made a statement that might have endangered the safety of the United States of America" [R. 4163-6, 4242].[64] They joined the Party with preconceived ideas of its purpose for which they sought confirmation [R. 1729-35].[65] Yet virtual illiteracy in the field of the ideas they were reporting on and concerning which they testified was commonplace [R. 1013-18; R. 1020-1; R. 1116-17; R. 1914-23; R. 2907-8; R. 3143; R. 4140-41; R. 4328-9]. They pretended to favor the principles of Communism so that they could gain the confidence and friendship of the people on whom they planned to inform [R. 1841-6; R. 7037-8]. Upon the basis of pretended friendship informers secured entree to social functions and to private homes and reported to the F.B.I. the names of every person present including the names of all the members of the families to whose homes they were invited, as well as "every scrap" of conversation overheard [R. 3108-9; R. 3116-18]. The witness Scarletto testified that it "could be" that a woman, whose name he reported, "treated him like a son"; that he "certainly" considered it "funny" that he had succeeded in soliciting a neighbor, whom he knew to be a non-Communist, for five dollars for the People's World and had then turned in his name to the F.B.I. [R. 3136-

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[64]However, this witness possessed the ability to identify a person as a Communist "by looking at him" [R. 4324].

[65]Note similarity to the witness Hynes in *Schneiderman v. United States*, 320 U. S. 118, 128-9.

40]; he had heard some "crying" about the question of violence against Communists but any interest he would have displayed "would have been part of my act" [R. 3166-7; R. 3172; R. 3178-9].

The paid informers as part of their job carried on activities designed to involve new people in the very conduct they were reporting to the F.B.I. They sold the People's World [R. 1627-32]; they made untrue public statements and falsely relied on constitutional grounds in refusing to answer questions [R. 1708-9].

The unreliability of the testimony of these witnesses was repeatedly *demonstrated.*[66] Thus, for example, persons were placed at meetings at which they or the witness could not possibly have been present [see pp. 63, n. 42; 70, n. 48, *supra;* R. 2510-11; R. 7974-83]. Completely erroneous identifications were positively made [see R. 3289; R. 3949-50; R. 5934-9; R. 5945-53; R. 7590-1]. The witness Scarletto testified that the war in Korea and its causes were discussed in November, 1949, about six months before the war began, in a school which ceased operating prior to the outbreak of hostilities [R. 3000-3; R. 3020-3]. Prior false statements under oath were admitted [R. 3249-50; R. 8630-35]. The witness Scarletto explained his false testimony that he was married in 1948 by relating that he could not get married in a church because of a prior marriage and that therefore he simply lived with the woman he called his wife, whom he took across state lines as such about the time he became an F.B.I. informant [R. 2877-8; R. 2894; R. 3081-91].

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[66]This does not refer to testimony inherently incredible like that of Daisy Van Dorn [pp. 32-37, *supra*], but to testimony conclusively demonstrated to be untrue.

Allegation of overt acts in the indictment and the proof thereof.

The first twelve overt acts alleged in the indictment are dated more than three years prior to the date thereof. Those numbered 13 through 23 were alleged to have been committed within the three year statute of limitations period. With respect to these, evidence was offered relating to only two. One charged: "On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting." This refers to the "Lenin Memorial Meeting" chaired by petitioner Steinberg and referred to in the opinion of the court below. [see p. 50, *supra;* Ex. 737, R. 8067-75, GA 207-11, App. Item 77, pp. 294-7; Clk. R. 105, 122-3].

The second overt act charged with respect to which proof was offered read: "On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California." This refers to a public meeting previously announced in the People's World held at the Embassy Auditorium in Los Angeles in January, 1950 with about 1600 persons present. This too was a "Lenin Memorial Meeting." Co-petitioner Schneiderman spoke on "the subject matter of the event being a Lenin memorial" [R. 8063]. A subsequent issue of the People's World [Ex. 159-A, R. 5032] stated that nearly 2000 persons had attended the meeting, that co-petitioner Schneiderman spoke on the "China situation"; that China was seen as the "key issue for 1950"; that the people demand to know the stand of Senator Downey and Congresswoman Douglas "on the vital issue of whether they support trade and recognition for the new China, or armed intervention" [R. 8057-66, App. Item 77, pp. 297-301].

The Philbrick articles—The F.B.I. report—Unfair trial.

Both at the outset and in the concluding phases of the trial, petitioners were confronted with a barrage of publicity, calculated to prevent a fair trial. The respondent was not accountable for the former; it was directly responsible for the latter.

A motion for a sixty-day continuance of the commencement of the trial was predicated upon the following facts:

On January 13, 1952, with the opening of the trial scheduled for February 1, 1952, the Los Angeles Times, a newspaper of general circulation published in the City of Los Angeles, announced the impending publication of a serialized story entitled "I Led Three Lives" by one Herbert Philbrick. The announcement was in banner headlines, and described Philbrick as one "whose electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11.'" Readers were informed that "he reveals how the Communists intend to overthrow the U. S. Government and when." On succeeding days, the announcements continued with such headlines as "When Will Reds Strike U. S."; "Inside Story of Reds' Plot to Begin Sunday"; "Ruthless Underground Red Tactics Exposed." On January 20, 1952, the series commenced with the following foreword: "The Times begins publication today of 'I Led Three Lives,' the dramatic story of Herbert A. Philbrick, 36, a Boston advertising man, who, after nine years underground for the FBI, was a key witness in the trial of 11 top Communist leaders in New York in 1949. They were convicted of conspiracy to teach and advocate the overthrow of the United

States Government and their conviction has been affirmed by the Supreme Court." In subsequent issues, other lurid headlines capped each installment of the Philbrick story, dealing with the "exposure of the Communist plot." The final installment was published on February 7, 1952 [R. 897-8]. On January 21, 1952, petitioners moved the District Court to continue the trial of the action until 60 days after the conclusion of the publication of the aforesaid story. The motion was denied by the District Court without opinion and the trial proceeded as scheduled.

On the afternoon of July 29, 1952, just as counsel for petitioners concluded their final arguments to the jury and on the eve of the closing arguments of respondent, there appeared in the press and on radio and television announcements that "a long secret FBI report" had just been released proving that the Communist Party of the United States advocates and teaches the overthrow and destruction of the Government of the United States by force and violence. Before the day's proceedings had ended and before the jury had left the courtroom. there were already being sold at every exit of the Federal Court Building in which the trial was held issues of the Herald-Express, an evening newspaper distributed in Los Angeles (circulation 305,056), with banner front page headlines in blaring red, reading, "FBI Bares Stalin U. S. Revolt Plot." The article itself was headed, "Armed Revolt Plot Told" [Ex. NG, R. 13,647].

Throughout the evening, announcements of similar import emanated from all radio and television stations in the Los Angeles area. Commentators on radio and television emphasized that the "long secret FBI report" revealed that Russian Premier Stalin had decided that

Communists can climb to power in the United States only by "forcible destruction" of the Government—never by peaceful means; that the purpose of the F.B.I. report, heretofore considered "highly confidential," was to set forth "documentary proof that the Communist Party, U.S.A., teaches and advocates the overthrow and destruction of the United States Government by force and violence" [Ex. NG, R. 13,647].

On the morning of July 30, 1952, the banner front page headline of the Los Angeles Times (circulation 396,112) read: "Stalin Plan To Conquer U. S. Told In FBI Report." A similar headline in the Los Angeles Examiner (circulation 323,936) read: "FBI Bares Stalin's Stand for 'Destruction' of U. S." The Mirror (circulation 202,325) carried the headline: "FBI Reports Reds Seek To 'Kill' U. S." [Ex. NG, R. 13,647].

The Report which these headlines publicized is 16 pages in length [Ex. NF, R. 13,647, App. Item 78, pp. 301-06]. It is entitled "Documentary Proof That The Communist Party, U.S.A., Teaches And Advocates The Overthrow And Destruction Of The United States Government By Force And Violence. (Govt. Printing Office, 1952)." From the preface of the report (p. v.) it appears that on June 21, 1952 and June 25, 1952, while petitioner Yates was testifying that according to her understanding Marxism-Leninism did not mean advocacy of the violent overthrow of our Government, Senator McCarran and J. Edgar Hoover exchanged letters, the purport of which was to arrange to make public a "compendium" prepared by the F.B.I. of documentary proof that the Communist Party "is dedicated to the overthrow of the Government of the United States by force and violence."

The introduction to the Report asserts that its purpose is to set forth "documentary proof that the Communist Party, U.S.A., teaches and advocates the overthrow and destruction of the United States Government by force and violence" (p. 1). The report then states that the Communist Party accomplishes this objective "through the circulation of Communist 'classics' and through urging the study of these works as 'guides to action'" (p. 1); that the works of Marx, Engels, Lenin and Stalin "do indeed teach and advocate the overthrow and destruction of government by force and violence"; that "Lenin and Stalin both specifically reject 'peaceful means'; that both insist on the necessity for violent revolution" (p. 1). Then follow quotations from the following writings, which, prior to the date of the correspondence, had been introduced in evidence in this case: Stalin's "Foundations of Leninism" [p. 2; Ex. 1, R. 1357; Ex. 606, R. 499]; "History of the C.P.S.U." [p. 7; Ex. 28, R. 1362; Ex. 608, R. 483]; "Communist Manifesto" [p. 9; Ex. 39, R. 1352]; "Proletarian Revolution and Renegade Kautsky" [p. 8; Ex. 504, R. 4403]; "State and Revolution" [p. 8; Ex. 11, R. 1360]; Foster's "In Defense Of The Indicted Leaders Of The Communist Party" [p. 3; Ex. FI, R. 5105]; "Capital," Vol. 1 [p. 8; Ex. Q, R. 1679]; "Anti-Duhring" [p. 9; Ex. HD, R. 6793].

The report was interspersed (pp. 2, 3, 7, 16) with conclusions that the Communist Party and Marxist-Leninist books advocate and teach the forcible overthrow of the Government and that reforms espoused are only covers for "illegal work." It stated (p. 2): "The customary Communist 'dodge' on the question of force and violence is

that the capitalist class will be the *first* to use violence, and the Communists will respond with violence. . . ."[67]

On the morning of July 30, 1952, petitioners orally moved for a mistrial [R. 13,519]. Leave was granted to file formal papers the next day [R. 13,528]. A request to suspend proceedings until the court had had an opportunity to rule upon the pending motion for a mistrial was denied [R. 13,528-35]. Respondent proceeded with its summation to the jury. On July 31, 1952, there was submitted an affidavit detailing the contents of the newspaper, radio and television publications, and of the F.B.I. report and alleging the irreparable prejudice and harm caused by the publication of said F.B.I. report [Ex. NG, R. 13,647; Ex. NF, R. 13,645-47].

After argument, the Court indicated that it would not grant the motion for mistrial without consulting the jury [R. 13,691]. The petitioners, without waiving their position that irremediable prejudice had already been shown, consented to an inquiry being made. The court ruled, however, that there would be no inquiry "in detail"; that there would be only one question, whether "that has happened to them [whether they had read or heard any of the publications], and if so, has it affected them in such a way, any of them, that they feel they could not

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[67]This not only labelled a "dodge" the position shown in this case to have been taken by co-petitioner Schneiderman and other petitioners, but it implicitly charged that the Supreme Court had been taken in by this "dodge." *Cf. United States v. Schneiderman*, 320 U. S. 118, 157.

with an open mind decide this case solely upon the evidence adduced here as they are duty-bound and oath-bound to do, and that is all. That we take their word for it, whatever it is . . . I expect to put it as a compound inquiry. It is a matter for the juror's conscience now." Petitioners requested that there be two separate questions: the first, whether the publications had been communicated to any juror and, if so, the second, what effect it had; petitioners' position, which they refused to waive, was that if the publication reached the jury that alone was sufficient to require that the motion for mistrial be granted. The trial judge thereupon denied the motion, without making any inquiry of the jury [R. 13,703-19, 13,722-3]. The petitioners then offered an instruction [Pet. Prop. Special Inst., Ex. NH, R. 13,723-25, App. Item 2(q), p. 69] specifically advising the jury to disregard the comments which had emanated from the press, radio and television. The instruction was refused. In a written opinion, the District Court reiterated its position, adding only that "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial." *United States v. Schneiderman, et al.*, 106 F. Supp. 906, 926 (Cert. App. B, p. 143). A motion for leave to interview the jury after verdict (the court having previously ordered the parties, their counsel and agents not to talk to any member of the jury) solely to determine whether they had read or were informed of the F.B.I. report was denied [R. 14,008-10].

Instructions and refusals to instruct.

The trial court gave certain instructions over the objections of petitioners and refused others proposed by them [Exs. NC, NC-1, NC-2, NC-3, ND, R. 13,777-834, App. Item 2, pp. 3-81].[68] The court, although requested to do so both by petitioners and respondent, refused to instruct the jury that the law punishes only advocacy and teaching of (or a conspiracy to advocate and teach) the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with the intent that such teaching and advocacy be of a rule or principle of action [Pet. Prop. Insts. 25, 29 and 51, Ex. NC-1, App. Item 2(q), pp. 69, 73-4, 76; Supp. App. Item[69] 28, pp. 36-6].

Over petitioners' objections, the jury was instructed that the word "organize" in 18 U. S. C. 2385 includes "the

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[68]The complete numbered instructions given [Ex. 750 for identification] are set forth in App. Item 2(a) to 2(p), pp. 3-69. Petitioners' objections are set forth in full directly following each instruction together with instructions requested in connection therewith. At the conclusion of the Court's instructions there are set forth other requests for instructions which the Court refused (App. Item 2(q), pp. 69-81).

[69]Supp. App. Item refers to Petitioners' Supplemental Appendix in the Court of Appeals, which Supplemental Appendix was attached as part of Petitioners' reply brief in said Court. Item 28 is respondent's proposed instruction: "In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group

recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" [Inst. 13, R. 13,756, 13,793, Ex. NC-1, App. Item 2(g), pp. 36-8]. The Court declined to instruct the jury as requested by petitioners: "To 'organize' means to furnish with organs, to give an organic structure to. To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size" [Pet. Prop. Inst. 34, App. Item 2(g), pp. 37-8].

The District Court refused to instruct the jury that mere proof of participation "in the Communist Party's lawful activities" was not proof of an "overt act"; that if the proof showed no more than the exercise by petitioners "of lawful discussion by speech and press," and "peaceable assembly and association to seek redress of grievances," then the "overt acts" had not been established [Pet. Prop. Insts. 39, 40, 42, 43, 44; App. Item 2(e), pp. 26-9]. The District Court simply instructed the jury

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and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

that an "overt act" under the indictment herein "need not be criminal in nature," and may be "as innocent as the act of a man walking across the street," so long as the "act" tends to accomplish the plan or agreement and is knowingly done in furtherance of "an object or purpose of the conspiracy charged in the indictment" [Inst. 11-H, R. 13,747, App. Item 2(e), pp. 24-5]. The trial court denied petitioners' request that the jury be instructed that the testimony of witnesses who entered the Communist Party at the request of the F.B.I. should be scrutinized closely and acted upon with caution [Pet. Prop. Inst. 77, Ex. NC-1, App. Item 2(q), p. 80].

Verdicts of guilty as to all petitioners were returned on August 5, 1952 [Clk. R. 96] and judgments imposing upon each petitioner the maximum sentence permitted by law, five years imprisonment and $10,000 fine, were entered on August 7, 1952 [Clk R. 102-3]. Notices of appeal were filed the same day. Motions for judgments of acquittal, for a new trial and in arrest of judgment were all made, argued and denied [R. 9384-93; R. 10,076-7, R. 12,569-76, R. 13,915-14,072, Clk. R. 103]; *United States v. Schneiderman,* 106 F. Supp. 906 (Cert. App. B, pp. 128-45). In its rulings the Court adopted respondent's theory that a series of inferences rendered the evidence sufficient to sustain the verdicts. These are: first, "that the Communist Party is an organization which advocates the duty and necessity of the overthrow of the government of the United States by force and violence

in order to achieve [its] ultimate goal [socialism];[70] second, "that the party intends to accomplish that result as speedily as circumstances permit;" third, "that a majority of the members of the party or, probably more accurately, at least, the dominant members of the party, embrace and support that objective and that method of achieving the objective;" fourth, "that these defendants are members of the Communist Party of varying degrees of standing and activity" and that, therefore, "the defendants embrace the doctrine and subscribe to the view that advocates the duty and necessity of overthrowing the government of the United States by force and violence as speedily as circumstances permit;" and fifth and finally, "from their membership in the Communist Party and the activities shown, the jury might infer . . . such concert of action as is described as a conspiracy" [R. 9987-8, App. Item 4, pp. 82-3].

The Court of Appeals affirmed in an opinion which declared "the trial impeccable from the standpoint of fairness and from the standpoint of adherence to principles theretofore laid down" [Clk. R. 105, 132].

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[70]This inference is itself predicated upon the inference that Marxism-Leninism requires the advocacy of the proscribed doctrine. In fact it is this inference which is the cornerstone for all the other inferences from which the finding of guilt was drawn. Thus respondent in arguing against petitioners' motion for judgment of acquittal said: "But here we believe that we have shown that these people have embraced and advocated the Marxist-Leninist doctrine, its teachings; . . . We are charging these people with being conspirators to advocate these doctrines" [R. 9975-6].

Summary of Argument.

The courts below sustained the convictions of petitioners in plain disregard of the standards fixed in *Dennis* and in violation of the mandate of the First Amendment. As thus construed and applied, the bounds of governmental power have been exceeded and petitioners deprived of their liberties by an unconstitutional enactment.

1. The convictions here can be sustained only upon a ruling that proof of long-time membership and officership in the Communist Party and legal activities therein is sufficient without more to justify a finding of guilt under an indictment charging a conspiracy to advocate and teach the forcible overthrow of the Government and to organize the Party for such purpose. As to six of the petitioners here, that was all the evidence established in this case. As to the five other petitioners, there was nothing in the few utterances attributed to them, as analysis shows, which could in any way sustain a finding of their connection with the conspiracy alleged in the indictment or the proscribed specified intent. The respondent must rely upon petitioners' membership, officership and activity in the Communist Party having no relation to the advocacy or teaching of force and violence as proof of each of the petitioner's guilt.

The theory of respondent, adopted by the courts below, is predicated upon three proven facts: first, that the Communist Party subscribes to the principles of Marxism-Leninism; second, that the large body of writings which comprise the doctrines of Marxism-Leninism include in historical context mention of violent revolution, with respect to which no such writing states that the present Government of the United States should be forcibly over-

thrown and all repeatedly indicate that the language in the writings is not to be taken literally and that the principles of Marxism-Leninism will vary in application dependent upon time, place and circumstances; and third, that petitioners were long-time Party members and officers, actively engaged in legal activities of the Party. From these premises, respondent and the courts below drew successive inferences, each inference pyramided on the preceding inference, viz.: Marxism-Leninism can only be construed as calling for the violent overthrow of the Government of the United States; from this inference it must be inferred that the Communist Party by its advocacy of Marxism-Leninism advocates the forcible overthrow of the Government; from this inferred Party advocacy it must be inferred that long-time members and officers of the Party, including each of the petitioners, knew that Marxist-Leninist doctrines as construed by the Party called for the violent overthrow of the Government of the United States; from such inferred knowledge it must be inferred that each of the petitioners agreed with the principles of Marxism-Leninism and the objectives of the Party as thus construed; from this inferred agreement it must be inferred that each of the petitioners agreed with the others to advocate and teach the forcible overthrow of the Government and to organize the Party for such purpose; from such inferred agreement, it must be inferred that the advocacy and teaching contemplated by the agreement was to be in language of incitement to action; and, from such inferred agreement, it must be inferred that each of the petitioners intended to accomplish the forcible overthrow of the Government as speedily as circumstances permit.

This theory explains respondent's reliance on a record barren of any substantial and competent direct or circumstantial evidence establishing the conspiracy alleged in the indictment, each of the petitioner's connection with such conspiracy, the proscribed specific intent or the power of petitioners to bring about an attempted forcible overthrow of the Government. It further explains why the respondent filled the record at inordinate length with hundreds upon hundreds of quotations wrenched out of context from numerous Marxist writings, and with extended proof of petitioners' membership and officership in the Party and legal activities therein.

A conviction under the Smith Act upon such theory is contrary to law and the Constitution. In cases involving the exercise of freedom of speech, every essential ingredient of the offense must be established by clear, unequivocal and convincing evidence. Conclusions of guilt in such cases cannot be drawn from a sequence of dubious, illogical and arbitrary inferences piled one atop the other. The interpretation and understanding of a large body of philosophical, scientific and historical writings may be as varied as the varied readers. Such interpretation and understanding cannot be imputed; to determine any particular knowledge or understanding there must be substantial proof of overt acts and declarations on the part of the particular reader clearly evidencing his particular understanding and interpretation. Such evidence was lacking here.

In presenting such a theory of inferred criminality from membership in the Communist Party and legal activities therein, respondent is resurrecting the doctrine of guilt by association, which this Court has uniformly condemned. Congress, too, in the enactment of Section 4(f) of the McCarran Act has rejected the doctrine as applied to members and officers of the Party. The adoption of respondent's theory as a substitute for sufficient proof of guilt under the indictment impairs petitioners' opportunities of free speech, press and assembly and deprives them of their liberties without due process of law.

Respondent's theory in *Dennis*, and the evidence therein, are essentially different from this case. In *Dennis*, the theory of the prosecution was predicated upon evidence of control by the accused of the Party apparatus and upon a finding of use of their leading positions to accomplish jointly the alleged agreement to advocate the forcible overthrow of the Government. Here the petitioners were not a homogeneous group exercising common powers, and they never jointly organized or determined any Party policies. Most of the petitioners occupied relatively minor and separate offices. There was no proof in this case of joint control or action allegedly aimed at the unlawful objectives of the alleged conspiracy. There was no common plan or agreement proven; "conspiracy" and the power to bring about the "evil" were inferred from mere membership and officership in the Communist Party and legal activities therein.

2. The only two "overt acts" alleged and proved were two innocuous public meetings held under the auspices of the Communist Party from which no inference that the alleged conspiracy was in execution could be drawn. The First Amendment forbids convictions based upon proof only of the exercise of wholly innocent acts of speech, press and assembly. What in effect was done by the courts below was to ignore the requirement of substantial proof of an "overt act" in furtherance of the conspiracy and to effect the object thereof, and to return to the doctrines of common law conspiracy. To assign the function of zero to the "overt act" under the general conspiracy law is to increase the threat to fairness in the administration of justice; to undermine freedom of assembly by making a petitioner's attendance or lawful utterance at a peaceable assembly an "overt act" in furtherance of the alleged conspiracy; and to undermine the landmark decisions of this Court in *DeJonge v. Oregon, Herndon v. Lowry* and *Schneiderman v. United States.*

3. Both the petitioners and respondent requested the trial court to instruct the jury that the Smith Act punishes only advocacy and teaching in language of incitement to action. All such requests were refused, the courts below holding that the Smith Act punishes any conspiracy to advocate and teach the forcible overthrow of the Government with unlawful intent, whether the contemplated advocacy and teaching is in language of incitement or not. Since there was no evidence of the use

of inciting language by petitioners, nor any plan by petitioners to do so in the future, the jury was left free to bring in a verdict of guilt under the indictment merely upon the alleged proof that petitioners, as members and officers of the Party, contemplated teaching and advocating, without incitement to action, the doctrines of Marxism-Leninism. In *Dennis*, from trial court level to the final ruling of this Court, not a single Judge or Justice differed with the view that the Smith Act must be necessarily construed as punishing only advocacy and teaching in language of incitement to action. This Court has uniformly held, in the light of law and history, that in our constitutional system the line must be drawn between the advocacy of ideas and doctrines, no matter how unpalatable, and the advocacy of ideas in language of direct incitement to unlawful action. The construction of the Smith Act by the courts below was a palpable violation of the First Amendment.

4. The trial court held that a conspiracy to advocate and teach the forcible overthrow of the Government with unlawful intent constituted *per se* a clear and present danger of an attempted forcible overthrow of the Government. The Court of Appeals upheld this ruling, adding only that world conditions had not changed since the ruling of this Court in *Dennis*. As a result, no consideration was given below by the court or the jury to the question of whether or not the alleged conspiracy contemplated advocacy or teaching in language of incitement to action; whether or not the petitioners, individually or

jointly, had the power to bring about an attempted forcible overthrow of the Government; or whether or not the nature of petitioners' activities was directed to such end. In refusing to give consideration to any question other than the questions of conspiracy and intent as alleged in the indictment on the issue of clear and present danger, the trial court abdicated the judicial function which the law and the Constitution required the court to perform, and which the court alone could perform, as this Court held in *Dennis*. Thus the courts below unjustifiedly applied the Smith Act to the petitioners here.

5. The courts below held that the word "organize" in the Smith Act includes the recruitment of new members, the forming of new units or the regrouping or expansion of existing clubs, classes and other units of "any society, party, group or other organization." This improvised and limitless construction of the statute finds no support in dictionary definitions, legal precedents or legislative history. On the contrary, all authority is opposed to this construction. The extended interpretation of the word "organize" by the courts below raises constitutional questions of serious import. Not only the recruitment of a single member into the Communist Party but even the act of joining may constitute "organizing" or "helping to organize" the Party under the Smith Act, according to the construction of the courts below. The prosecution here for conspiracy to organize as alleged in the indictment was barred by the statute of limitations. It is impossible to determine now from the general verdict

of the jury whether or not the jury's determination was based solely upon this charge, especially since the prosecution here, as in *Dennis,* relied principally upon the organizing aspect of the indictment.

6. Not only was the First Amendment violated in all the aforesaid essential respects, but petitioners were also deprived of a fair trial without due process of law. The publication of the F.B.I. report by the Department of Justice, dealing with some of the essential issues of fact in the case as viewed by the prosecution itself, on the very eve of the submission of the case to the jury, was a direct interference with the administration of justice. The refusal of the trial court appropriately to explore the matter with the jury after the coercive and hysterical publicity which accompanied the publication of the Report had been amply established, and the refusal to give any specific instructions requested by petitioners, were serious errors. The trial court also erred at the outset of the trial in refusing a motion for a continuance until sixty days after the completion of the publication of a story in serial form entitled "I Led Three Lives," which story was publicly stated to have been written by a prosecution witness in the *Dennis* trial and purported to detail "how the Communists intend to overthrow the U. S. Government and when." Failure to grant petitioners an impartial trial under the Constitution vitiated the verdict.

ARGUMENT.

I.

The Evidence Is Insufficient to Support the Verdicts.

The Scope of Review.

This Court has said that in a criminal case it will examine the record to ascertain whether it contains evidence adequate to permit a finding of guilt beyond a reasonable doubt (*Mortensen v. United States*, 322 U. S. 369, 374). By the ordinary standards of criminal law, the evidence in this case is insufficient to sustain the conviction of any petitioner; and it does not even approximate the character and quality of proof rendered imperative by the higher standards, applicable in a Smith Act prosecution, requiring "special heed to the demands of the First Amendment marking out the boundaries of speech." (*Dennis v. United States*, 341 U. S. 494, 503.) The courts stand guard against any punitive invasion of the area delineated by these boundaries. This task is one which this Court has announced it will not shirk because indeed it "cannot . . . . withhold the judgment that history authenticates as the function of this Court when liberty in infringed" (*West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, 640; *Cf. Chambers v. Florida*, 309 U. S. 227, 241). In *Dennis* the Court gave assurance that it would fulfill this high responsibility in future Smith Act cases. "Where there is doubt as to the intent of defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. at 516; specifically held applicable to these petitioners, *Stack v. Boyle*, 342 U. S. 1, 5).

The assertion that a "doubt" concerning the sufficiency of the record will be enough to invoke the scrutiny of this

Court was not a mere exuberance; it must be regarded as a statement that this Court intends to secure the people of this nation against governmental transgression, upon unconvincing proof, into the area shielded by the First Amendment. This duty requires the Court to examine the record in this case with a vigilance that will expose and strike down any device calculated to secure a conviction at the expense of constitutionally guaranteed freedoms. It necessitates an examination of the evidence, particularly with respect to the nature of each petitioner's activities, to determine whether it is sufficient to permit a finding beyond a reasonable doubt of (1) a conspiracy to advocate the violent overthrow of the Government of the United States; (2) each petitioner's connection therewith as shown by his activities; (3) each petitioner's specific intent to accomplish such violent overthrow as speedily as circumstances will permit; and (4) the power of petitioners to bring about an attempt at such violent overthrow (*Dennis v. United States,* 341 U. S. 494).

The record must be analyzed to ascertain whether there is direct evidence adequate to support beyond a reasonable doubt each of these essential findings, and, where that is lacking, whether these findings may be thus supported by inferences properly emanating from the direct evidence. A "sinister meaning attributed" by the prosecution to language used by defendants will not suffice. The record must show acts, statements or declarations by the defendants indicating that they understood the language as having or that they intended it to have the sinister meaning which rendered the speech culpable. (*Fiske v. Kansas,* 274 U. S. 380, 385-7.) No constitutionally permissible inference of guilt may be drawn from acts or utterances which may fairly be inferred to be the

exercise of protected freedoms (*Hartzel v. United States,* 322 U. S. 680; *Schneiderman v. United States,* 320 U. S. 118; *DeJonge v. Oregon,* 299 U. S. 353; *Herndon v. Lowry,* 301 U. S. 242). Moreover the direct evidence and the inferences drawn therefrom must certify "that solidity of proof which leaves no troubling doubt." Whether from the entire record this "exacting standard of proof has been satisfied" presents a question for this Court. In resolving this issue it is necessary to scrutinize "the nature of the materials" on which the findings are based in order that "fallible evidence," such as that of speech more "rhetorical" than "conclusive," not be substituted for what has been referred to variously as "weighty proof," a "compelling" record and "clear, unequivocal and convincing" evidence (*Baumgartner v. United States,* 322 U. S. 665, 670-77).[71] When the record in this case is put to the test that the Constitution demands, it is found wanting on every issue.

The following discussion is intended to demonstrate the aforesaid infirmities in the record. We analyze, first, the evidence against the petitioners to show how completely barren the record is to establish the connection of each of the accused with the conspiracy charged in the indictment. We then discuss the invalidity of respondent's abstract theory of guilt whereby a series of unfounded and pyramided "inferences" are substituted for "clear, convincing and unequivocal" proof. We show how this "inference" theory is contrary to law and logic, to express

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[71]The burden of proof in a denaturalization case like *Baumgartner* "is substantially identical with that required in criminal cases" (*Klapprott v. United States,* 335 U. S. 601, 612). This identity is the more complete because of the similarity of the First Amendment problems presented in the cited and instant cases (*Cf. Pennekamp v. Florida,* 328 U. S. 331, 347-8).

Congressional intent, and impermissible in our constitutional system. The discussion then demonstrates that the evidence neither established the conspiracy charged in the indictment nor the requisite specific intent of any of the petitioners. Finally, it is shown that there was no evidence to establish that these petitioners, individually or jointly, had the power to bring about the substantive evil which the legislature had a right to prevent.

A. The Evidence Does Not Establish the Connection of Any Petitioner With the Conspiracy Charged.

There is a complete absence of evidence upon which any petitioner's connection with a conspiracy as charged can be sustained. A conspiracy is an agreement; it requires a meeting of the minds of the conspirators. A defendant's connection with a conspiracy cannot be shown without proof of his adherence to that agreement. Such adherence may be proved only through the declarations and conduct of the individual defendant [*Sugarman v. United States*, 35 F. 2d 663 (C. A. 9, 1929); *May v. United States*, 175 F. 2d 994, 1008 (C.A. D.C., 1949); *Mayola v. United States*, 71 F. 2d 65, 67 (C. A. 9, 1934); *Kuhn v. United States*, 26 F. 2d 463, 464 (C. A. 9, 1928); *United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 973 (D.C. S.D. Cal., 1942); *Cf. United States v. White*, 322 U. S. 694, 702-3]. On this issue each petitioner "stands before the bar of justice as an individual. Even in a conspiracy charge defendants do not lose their separateness or identity" (Mr. Justice Jackson concurring in *Stack v. Boyle*, 342 U. S. 1, 9).

Membership in the Communist Party does not constitute membership in the conspiracy charged. The indictment on its face and as construed by the parties and the

trial court charged an agreement to engage in the forbidden advocacy and to organize the Communist Party as the organizational apparatus for such advocacy. Accordingly a finding of participation in the conspiracy requires for each petitioner an adequate showing through his acts and conduct that he was party to a meeting of the minds on the advocacy of the overthrow of the Government of the United States by force and violence [R. 3379, 3405, 3473, 8734; Inst. 11-J, R. 13,749, App. Item 2(f), p. 30; Inst. 13, R. 13,756, App. Item 2(g), p. 36; Inst. 11-D, R. 13,745-6, App. Item 2(d), p. 22; Inst. 11-I, R. 13,747-8, App. Item 2(f), pp. 29-30; Inst. 14-B, R. 13,759, App. Item 2(h), pp. 40-41].

The only evidence against most of the petitioners is that they have been members and officers of the Communist Party and that they have engaged in constitutionally protected activities therein, none of which even by the most tenuous argument could be said to show adherence to an agreement to engage in the proscribed advocacy. With respect to several of the petitioners, there is evidence of a few isolated and equivocal incidents, which when measured by the standards prevailing in a case such as this, add nothing of substance to the evidence of Party membership and the exercise of constitutionally guaranteed rights within or under the auspices of the Party. We turn to a discussion of these incidents.

1. The crucial period, during which connection with the conspiracy charged must be established, is the three year period preceding the return of the indictment—the area of time within the statute of limitations. During that period there is *only one* incident involving *only one* petitioner which even merits consideration in determin-

ing whether any conduct pointing to participation in an illegal agreement is to be found in the record.

This one incident occurred in the community of Chico in 1950 when a paid F.B.I. informer was in the process of being expelled from the Party for "chauvinism" and for carrying a gun while distributing Party leaflets. Expulsion on these charges, petitioner Lambert is reported to have said, was a step in the preparation of the Party for "emergency or revolution." The informer, according to his own testimony, then asked whether it was true that a revolution "by bullets instead of ballots" was being prepared, and a *third person* asked "What the Hell do you think we are purging the Party for?" (See p. 76, *supra*).

In weighing what this testimony adds to the respondent's showing of petitioner Lambert's alleged connection with the conspiracy charged, it is necessary to consider certain general principles applicable to much of respondent's evidence.

(a) Testimony from the unaided and uncorroborated recollection of a paid informer is an inherently weak species of evidence. It should be examined "with greater scrutiny and care than the testimony of an ordinary witness." *Fletcher v. United States*, 158 F. 2d 321 (C.A. D.C., 1946); *Cf: District of Columbia v. Clawans*, 300 U. S. 617, 630. The use of paid informers in cases involving thoughts, opinions or political activities is inconsistent with a free society. "The informer smacks of the police state." N. Y. Times, July 8, 1954. There is a danger to the administration of justice when witnesses, who make their living at this game, feel the necessity of continuing to "produce" if they are not to give up their

lucrative occupation. A premium is placed on perjury. When persons are employed to spy on associations deemed "subversive," there is the tendency to lie and distort as a matter of "patriotism." Evidence is manufactured because it is deemed good for society. Chafee, *Free Speech In the United States* (1941), pp. 277-80.[71a] These principles are the more applicable here because the alleged conversation took place during an incident which led to the loss of the witness' highly remunerative employment as an informer.

(b) Not only the source but the character of the testimony renders it unreliable. It consists of what a hostile witness testifies he recollects that he heard. Words are subject to many constructions depending upon the context in which they are used, the manner in which they are uttered (whether seriously, in jest, sarcastically or polemically), and the attitude of the listener to the speaker (whether friendly or hostile, respectful or suspicious). The self-interest of the hearer colors what he hears. A gap in the knowledge of the subject matter between the one who expresses an idea and the one who listens can result in an understanding of what is heard quite different from what is intended by the speaker.

[71a] The trial judge refused to instruct the jury as requested by petitioners that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution (Prop. Inst. 77, Ex. NC-1, App. Item 2(q), pp. 69, 80). To have denied this specific request in the light of the record was reversible error. *District of Columbia v. Clawans*, 300 U.S. 617, 630; *Fletcher v. United States*, 158 F. 2d 321, 322 (C.A. D.C., 1946); *Fisher v. United States*, 231 F. 2d 99 (C.A. 9, 1956); *Sigurdson v. Landen*, 215 F. 2d 791 (C.A. 9, 1954); *Gratty v. United States*, 163 F. 2d 844 (C.A. D.C., 1947); *Cf. Communist Party v. Subversive Activities Control Board*, ... U.S. ....., 100 L. ed. Adv. p. 554.

The more complex the subject matter of the speech or the concepts to which it has reference (regardless of other differences in view point concerning Marxism-Leninism, its complexity cannot be doubted), the greater the margin of probable misconstruction. To all this must be added the multiplicity of shades of meaning which may reasonably be attributed to almost any word or phrase. Differences in comprehension of carefully formulated writings are not unknown to the law or for that matter to this Court (See Wigmore, *evidence* (3rd ed.), Vol. 7, Section 2094, pp. 467-9).

The passage of time between the speech and its reporting aggravates all of the problems inherent in an honest attempt to accurately report what was said. What the witness relates is not the words that were used but his comprehension of them sifted "through the distorting and self-deluding medium of memory" *Baumgartner v. United States*, 322 U. S. 665, 675 When the ease of deliberate distortion or actual fabrication is added to the other weaknesses in testimony of this character, it becomes apparent why Wigmore has concluded that "no substantial reliance" may be placed on it (*Evidence* (3rd ed.), Vol. 7, Sec. 2094, p. 468).

(c) An informer's testimony concerning oral declarations being intrinsically unreliable on two scores, any uncertainty as to the conclusion to be drawn therefrom renders it virtually valueless. *Cf. Pulver v. Union Inv. Co.*, 270 Fed. 699, 705 (C.A. 8, 1922); *Lubriko v. Wyman*, 290 Fed. 12, 16 (C.A. 3, 1923). Particular care must be taken in drawing inferences involving the intent with which words are used and equivocal language will not suffice. *Shepard v. United States*, 290 U. S. 96, 100;

United States v. Ross, 92 U. S. 281, 283; *Rivera v. United States*, 57 F. 2d 816, 822 (C.A. 1, 1932). Thus it has been said that "strong words are not evidence of malice" (*Dickins v. International Brotherhood, etc.*, 171 F. 2d 21, 25) and neither are they evidence of participation in a conspiracy to advocate the overthrow of the Government by violence. If such declarations are susceptible of an innocent interpretation, they may not become hallmarks of guilt. *Keegan v. United States*, 325 U. S. 478.

Here all that petitioner Lambert is reported to have said is that the Party was being purged for emergency or revolution. There is nothing indicating that he thought of violence in connection with this alleged statement; the circumstances point in the opposite direction. For the "purging" that was taking place involved the elimination from membership of a man who mistreated Negroes and who carried a gun; ruthless people with guns are essential to the initiation of a violent revolution; they are obstacles to those who desire to bring about change by peaceful methods.

Of course, the informer claims that he asked the bullets instead of ballots question. But these were not the words of petitioner and he did not respond to them. The response from another person in the form of the question "What the Hell do you think we are purging the Party for?", cannot be equated to a statement that the Party was being purged for a revolution by bullets. In order to attribute such an understanding to petitioner Lambert, it would be necessary to indulge in the following assumptions: first, the question itself was intended to indicate an assertion that the informer was being expelled for

carrying a gun because a revolution by bullets was being planned. The contrary conclusion that the Party was being purged of those elements who leaned toward violence is, at least, equally plausible; second, starting from this first insecure premise it is necessary to suppose that petitioner understood the question to have the evil connotation; third, it must then be assumed that petitioner agreed with the language so construed; fourth, from this it must be found that he was a member of the conspiracy charged. Such a series of inferences arising from an insecure foundation hardly afford the solidity of proof which is required in a case such as this (See discussion *re* pyramiding of inferences, pp. 145-158, *infra*).

(d) This informer's testimony as to oral declarations, helpful to respondent only by imputation of an evil contruction to ambiguous language followed by a series of doubtful inferences, is unreliable for other reasons. Appellate courts have carefully examined testimony of unsworn statements to ascertain whether the specific evidence is sufficiently trustworthy to support a judgment. In so doing the Courts have given consideration to the following factors: "That the testimony is improbable . . . absurd . . . not in harmony with the conduct of the witness or declarant . . . that the witness is not corroborated by any independent circumstances in the case . . . that the alleged statement was made . . . in the heat of discussion." 31 C.J.S., Evidence, Sec. 268, p. 1019. Such factors merit special attention in a First Amendment case where the evidence must be clear and convincing in order to sustain a conviction. *Herndon v. Lowry*, 301 U. S. 242; *Fiske v. Kansas*, 274 U. S. 380; *Hartzel v. United States*, 322 U. S. 680.

The evidence concerning this alleged incident is out of joint with the testimony as a whole. Given its illegal connotation, it means that *in 1950* the Party was *then planning and preparing for* a revolution by bullets instead of ballots. If this were true, it could be expected that conversations concerning these plans were being carried on in the Party at places other than the little town of Chico and on other occasions than the expulsion of a member because among other things he carried a gun. In fact it would be difficult to imagine a more unlikely place or occasion for a disclosure of this character. If such a momentous task were being then contemplated by a conspiracy of which petitioners were assertedly a part there would be some corroboration, from among the substantial number of spies and informers who were available to testify, of petitioners' participation in the preparation therefor. But the record reveals not a single discussion at any time and not a single act by Lambert or any other petitioner consistent with the unfolding of such plans.

Moreover during the entire three year period preceding the indictment there is no evidence that petitioner Lambert or indeed any other petitioner said or did anything relating in any way to advocacy of violence or of revolution. On the other hand the record is replete with evidence of the pursuit by petitioners of legal objectives through legal channels, tending to negate the view that their objective was unlawful advocacy. *Keegan v. United States*, 325 U. S. 478, 485. The evidence relating to this incident cannot be reconciled with the rest of the record. Its introduction as part of respondent's case emphasizes the anaemic character of the record upon which the convictions rest.

For the entire three year period within the statute of limitations there is no evidence to support the convictions unless it be petitioners' membership and officership in the Party, legal activities therein plus whatever the Chico incident may add insofar as the petitioner Lambert is concerned.

2. In the period between the alleged beginning of the conspiracy in 1940 and the time when the statute of limitations began to run in 1948, there are several incidents of dubious impact based upon unreliable testimony which require examination. In evaluating this evidence it must be remembered that the petitioners' connection with conspiracy must be established for the period within the statute of limitations. Accordingly, any evidence relating to such connection during the period outside of the statute depends, for its ultimate effectiveness, upon an inference of continuity. Such an inference or presumption must rest upon a durable foundation and fit neatly into it; "some isolated circumstance" is not the stuff to support it. *Maggio v. Zeitz*, 333 U. S. 56, 65-6. It "grows weaker as time passes, until it finally ceases to exist." *Marin v. Ellis*, 15 F. 2d 321 (C.A. 8, 1926). (See also *Brune v. Fraidin*, 149 F. 2d 325 (C.A. 4, 1945); *Liverpool & London & Globe Insurance Co. v. Nebraska Storage Warehouses*, 96 F. 2d 30, 36 (C.A. 8, 1938) [three year passage of time destroys presumption].)

Here the link to the pre-statute incidents is tenuous. It consists of the fact that the petitioners involved were members of the Communist Party both at the time of the alleged incidents and during the period within the statute. The incidents, it is claimed, establish that the Party advocated violent revolution and the petitioners involved

knew it. It is then presumed that both the character of the Party and the petitioners' knowledge thereof continued unchanged. This assumption is inconsistent with the uncontradicted evidence that the position of the Party does change from time to time. As Chief Judge Knox said in *United States v. Lustig*, 16 F.R.D. 378 (D.C. N.Y., 1954): "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical. See the majority opinion of the Supreme Court in Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. See also, U. S. v. Hauck, 2 Cir., 155 F. 2d 141 and U. S. v. Sotzek, 2 Cir., 144 F. 2d 576." The evidence does not support any finding of connection with the conspiracy charged as of the time that the incidents allegedly occurred, let alone a presumption of continuance.

(a) *Petitioner Stack.* The first of these incidents involves a speech allegedly made by the petitioner Stack in 1945 when she is reported to have urged the reinstitution of Marxist-Leninist principles and to have declared that American workers would be the "grave diggers of the capitalistic government" [R. 3860-2, GA 130]. Marxist-Leninist principles cannot be mechanically equated with the proscribed advocacy; and the use of a rhetorical phrase relating to the burial of a "system" does not connote advocacy of violence. Any inference of such advocacy involves a choice between alternative inferences, with the nonculpable alternative being at least equally deducible. From an inference thus arbitrarily selected to draw the further inference of continuance and from the latter to draw the inference of connection with a conspiracy defies logic and undermines the protection of

the First Amendment. Particularly is this so because this weakest of all kinds of testimony—that concerning an oral declaration—is here funnelled over a period of six years through the unreliable and untrustworthy recollection of a paid informer—Stephen A. Wereb—who offered fervent prayers that he would never understand the subject of Marxism-Leninism concerning which he testified (see p. 103, *supra*).

According to the testimony of another paid informer (one who relied on his income from this source for his livelihood, see p. 88, *supra*), petitioner Stack in 1946 spoke of the Communist Party as "the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form of government set up" [R. 1339-41, GA 29-30]. Such a statement no more clearly points to advocacy of violence than would urging of the overthrow of a political machine or of our bicameral legislative system. It adds only a further basis for surmise and conjecture which in times of stress is all too often allowed to perform the function of clear and convincing evidence.

Finally, with respect to petitioner Stack, in a speech in 1948 in which she discussed the "exploitation" of women and said that it would be ended only under socialism, she is reported to have used words "to the effect" that "women should take up the necessary arms side by side with men" and bring about the change to socialism (see p. 90, *supra*). The references in the same speech to the "historic" women of Russia; to the "dawn of socialism," and to making "household activities secondary," give meaning to the manner in which the words "take up necessary arms" were used. Such words cannot

3. Respondent's Own Direct Evidence Refutes Its "Inference" Theory.

One of the inferences which respondent would draw from the evidence is that the Communist Party advocates the violent overthrow of the Government. There is, however, direct evidence from the Government's own exhibits including the Constitution of the Party [Ex. 21, R. 1518] that the Party opposes this doctrine. This direct undisputed evidence is inconsistent with the suggested inference and the inference is therefore contrary to law. Moreover, it should again be noted that here, unlike *Dennis*, there was no prosecution witness to testify that the Party Constitution, with its express disavowal of the use of force and violence, had some different meaning or that these petitioners understood the language differently than from what was stated. When a case is based upon an inference, it "must fail upon proof of undisputed facts [the Constitution put in evidence by the respondent is undisputed] inconsistent with such inferences." *George v. Missouri P. R. Co.*, 213 Mo. App. 668, quoted with approval in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 341. No conviction may be based on one opinion regarding an "economic theory about which there are two opinions supportable by plausible argument" *Maryland & Virginia Milk Producers Assn. v. United States*, 193 F. 2d 907, 916 (C.A. D.C., 1951).

4. The Legal Precedents Are Overwhelmingly Opposed to Respondent's Theory of Pyramided Inferences.

The law does not permit the foregoing foundational inferences as to the meaning of Marxism-Leninism and the nature of the Communist Party. Repeatedly the Courts have declared that they will upset judgments

affecting life, liberty and property where the results were predicated upon conjecture rather than proof. *United States v. Breitling*, 61 U. S. 252, 254; *Railroad Co. v. Houston*, 95 U. S. 697, 703; *The Folmina*, 212 U. S. 354, 363; *N. W. Pac. R. R. Co. v. Bobo*, 290 U. S. 499, 502; *Dennert v. United States*, 147 F. 2d 286 (C. A. 6, 1945); *Dahly v. United States*, 50 F. 2d 37 (C. A. 8, 1931); *Karn v. United States*, 158 F. 2d 568, 572 (C. A. 9, 1946). Even in a civil case, to avoid conjecture an inference must be consistent with the evidence and flow logically from it. In a criminal case the rule is more stringent. The facts must lead to the inference with such compelling force that it may lead a reasonable mind to fairly find guilt beyond a reasonable doubt. *United States v. National Ass'n. of Real Estate Boards*, 339 U. S. 485, 493; *Curley v. United States*, 160 F. 2d 229, 232-3 (C.A. D.C., 1947), cert. den. 331 U. S. 837; *Lempie v. United States*, 39 F. 2d 19 (C. A. 9, 1930); *United States v. Renee Ice Cream Co.*, 160 F. 2d 353 (C. A. 3, 1947); *Bryan v. United States*, 175 F. 2d 223 (C. A. 5, 1949), affirmed on other grounds, 338 U. S. 552. In a case involving the issue of free speech, the inference must meet the additional requirement of solidity of proof, and it can find no support in evidence of acts or utterances which may reasonably be inferred to be the exercise of protected freedoms. *Hartzel v. United States*, 322 U. S. 680; *Baumgartner v. United States*, 322 U. S. 665, *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Schneiderman v. United States*, *supra*, 320 U. S. 118.

Where in a free speech criminal case the judgment is predicated upon an inference drawn from proven facts, the record must be examined to ascertain whether that

inference so clearly follows from the facts, without the intervention of conjecture or surmise, that it can bear the burden of the judgment resting upon it. Where the inference relied upon lacks these solid roots deeply embedded in the established facts, the judgment cannot stand. *Boyd v. United States*, 142 U. S. 450, 458; *Clyatt v. United States*, 197 U. S. 207, 222; *Grau v. United States*, 287 U. S. 124, 128; *Gart v. United States*, 294 Fed. 66 (C. A. 8, 1923); *Wolcher v. United States*, 200 F. 2d 493 (C. A. 9, 1952); *Gold v. United States*, 36 F. 2d 16 (C. A. 8, 1929); *Norton v. United States*, 92 F. 2d 753 (C. A. 9, 1937); *Yusem v. United States*, 8 F. 2d 6 (C. A. 3, 1925); *Rossi v. United States*, 49 F. 2d 1 (C. A. 9, 1931); *Johns v. United States*, 195 F. 2d 77 (C. A. 5, 1952).

Here the respondent is forced to rely not only upon an inference lacking a solid base but upon a series of inferences piled precariously on top of the first one. The less closely and inseparably an inference is linked to a fact, the closer the inference approximates pure conjecture. It is for this reason that many courts have flatly declared that an inference must be drawn from fact, not from another inference.[75] "Conviction cannot

[75] *Manning v. Insurance Co.*, 100 U. S. 693, 698; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 488; *Brady v. United States*, 24 F. 2d 399, 404 (C. A. 8, 1928); *Simon v. United States*, 78 F. 2d 454, 456 (C. A. 6, 1935); *J. W. Ringrose Co. v. W. & J. Sloane*, 266 Fed. 402 (D.C. E.D. Pa., 1920); *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 331 (C. A. 8, 1944); *Southern Railway Co. v. Stewart*, 115 F. 2d 317, 322 (C. A. 8, 1940), modified on other grounds, 119 F. 2d 85; *General Reinsurance Corp. v. Southern Surety Co.*, 27 F. 2d 265, 272 (C. A. 8, 1928); *Lincoln National Life Ins. Co. v. Erickson*,

be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt." *Rosenberg v. United States,* 120 F. 2d 935, 937 (C. A. 10, 1941). This rule simply requires that "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed." *C. M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472, 477. Although the rule that one inference *may never* be founded on another has been subjected to criticism, its basic premise that inferences remotely rather than directly related to proven facts are untrustworthy is unquestionably sound. Where a whole series of presumptions are piled one atop another, the ultimate presumption is shaky indeed. It affords no support for any judgment (*Allen v. Trust Co. of Georgia,* 149 F. 2d 120, 127 (C. A. 5, 1945, aff'd 326 U. S. 630; *Cronin's Estate v. Commissioner of Internal Revenue,* 164 F. 2d 561, 565 (C. A. 6, 1947), let alone one requiring the solidity of proof which a First Amendment case demands.

Where knowledge is inferred, the facts upon which the inference is based must be proved directly. Otherwise the purported ascertainment of what lies inside a man's

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42 F. 2d 997, 1002 (C. A. 8, 1930); *Vernon v. United States,* 146 Fed. 121, 125-6 (C. A. 8, 1906); *Cf., United States v. Reginelli,* 133 F. 2d 595, 598 (C. A. 3, 1943); *Brown v. Maryland Casualty Co.,* 55 F. 2d 159, 160-1 (C. A. 8, 1932); *Tucker, et al. v. Traylor Engineering & Mfg. Co.,* 48 F. 2d 783, 786 (C. A. 10, 1931); *Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co.,* 112 F. 2d 302, 311 (C. A. 7, 1940), reversed on other grounds, 312 U. S. 410; *Gas Service Co. v. Hunt,* 183 F. 2d 417, 420 (C. A. 10, 1950); *Travellers Ins. Co. v. Warrick,* 172 F. 2d 516, 519 (C. A. 5, 1949); *Cunard SS Co. v. Kelley,* 126 Fed. 610 (C. A. 1, 1903).

mind is little more than suspicion. *United States v. Russo*, 123 F. 2d 420, 421-3 (C. A. 3, 1941); *Gargotta v. United States*, 77 F. 2d 977, 983 (C. A. 8, 1935). Likewise the process of "piling inference upon inference" condemns a finding of a state of mind inferred from knowledge which is itself inferred.[76] Here respondent's theory requires that an inference of knowledge be extracted from other inferences and that, not only the state of mind of an individual, but in addition the meeting of the minds of a group of alleged conspirators be inferred from the inferred knowledge, as part of a sequence of inferences all essential to a finding of guilt.

To sustain the convictions of petitioners, conjecture has been disguised to appear as proof. This disguise has been effected by a series of speculations playing the role of inferences, each of which totters on the insecure foundation of its predecessor. The Court in the *Schneiderman* case pierced a similar disguise and exposed the nakedness underneath. Said the Court:

> "Since it is doubtful that this [advocacy of violent overthrow of the United States Government] was a principle of these organizations, it is certainly much more speculative whether this was part of petitioner's philosophy [even though he was a member and officer]." (320 U. S. at 145.)

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[76] "Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." *Direct Sales Co. v. United States*, 319 U. S. 703, 711.

C. Membership and Officership in the Communist Party, Together With Lawful Activities Therein, Leads to No Inference of Criminality—Section 4(f) of the McCarran Act and Respondent's Reliance Upon Guilt by Association.

If respondent's "inference" theory is untenable in imputing a reprehensible interpretation of Marxist writings to these petitioners without clear proof that petitioners adopted such reprehensible interpretation, this theory is made more unsound by respondent's contention that inferences of criminality can be drawn solely from membership and officership in the Communist Party, together with lawful activities therein.

At various stages of this case respondent has argued that it was not relying simply on the long-time membership and officership of each petitioner in the Party but upon the fact that each was shown to have been exceedingly active in the Party. But this merely adds a fact to the others upon which the structure of inferences is erected; it does not affect the piling on process itself. This is so because the activities shown are legal activities, such as engaging in election campaigns, adopting and supporting legislative programs, urging the adoption of certain policies in foreign affairs and so on. Even such activity as the holding of a Lenin Memorial meeting at which the Bill of Rights is discussed and Smith Act prosecutions condemned is legal, regardless of how unpopular such activity may be. No inference of guilt may be drawn from these innocent activities. *Langer v. United States*, 76 F. 2d 817, 827 (C. A. 8, 1935).

Enacted after the decision of the Second Circuit in the *Dennis* case, section 4(f) of the Subversive Activities

Control Act of 1950 (50 U.S. C.A. 783(f)) makes explicit that which is implicit in the *Dennis* opinions—that membership or position in the Communist Party, together with lawful activities therein, standing alone cannot establish guilt. Its legislative history demonstrates a Congressional purpose to fashion out of section 4(f) a protection against compulsory self-incrimination and guilt by association. Obviously this section was adopted in an attempt to avoid impairment of Fifth Amendment rights in the statutory scheme for compulsory registration of members of "Communist" organizations. Early in the history of the legislation before the Senate,[77] it was pointed out that the registration requirements might well compel self-incrimination under the penal provisions of another section of the same bill (Senate Report No. 1358, 81st Cong., 2d Sess., Letter of John W. Davis, Esq.). The Committee on the Judiciary reported that both Senate bills were drafted to meet the "constitutional objections of John W. Davis." Thus, the Committee attempted a remedy which it termed a "specific bar to self-incrimina-

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[77]This is Title I of the Internal Security Act of 1950, Act of September 23, 1950, c. 1024, 64 Stat. 987. Section 1(a) of Title I provides, "This title may be cited as the 'Subversive Activities Control Act of 1950'." Title I was codified at 50 U. S. C. A. 781 ff.

There were two closely identical bills before the Senate, S. 2311 and S. 4037. As is below indicated, the two measures were merged in the course of consideration by the Senate. Later, the merged measures were taken up in conference with House members, together with a similar bill, H. R. 9490, from which the final legislation emerged. Senate and House reports on all three bills are accordingly material here. They are designated as follows. Senate Report No. 1358 (to accompany S. 2311), 81st Cong., 2d Sess.; Senate Report No. 2369 (to accompany S. 4037), 81st Cong., 2d Sess.; House Report 3112 (Conference Report), 81st Cong., 2d Sess.

tion written into Section 4(f)" (Senate Report 1358, *supra*, pp. 20-21).[78]

Simultaneously the framers of the legislation avowed marked solicitude to avoid guilt by association. In its report on S. 2311 the Committee on the Judiciary claimed that the bill satisfied the test laid down by the Supreme Court in *Knauer v. United States*, 328 U. S. 654, and quoted from the majority opinion the portions reaffirming the rule against proof by imputation and upholding the denaturalization of Knauer as based upon a "pattern of conduct" and "overt acts," rather than membership in an organization. In this respect the committee said that "Section 4, requires individually incriminating evidence

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[78]At that stage of the legislation, however, Section 4(f) applied to no other criminal statute than the proposed statute of which it was a part (Senate Reports No. 1358, *supra*, p. 17, and 2369, *supra*, p. 17). That the registration provisions raised self-incrimination difficulties also with respect to the Smith Act was brought to the attention of the Senate in the minority report on S. 4037 (Senate Report No. 2369, *supra*, p. 13) and in the debate (96 Cong. Rec. 14491, 14500). Similarly in the House debate on H. R. 9499, it was objected that the bill failed to provide protection against self-incrimination with respect to the Smith Act (96 Cong. Rec. 13739). Thereupon the author of the bill, who was also the chairman of the committee reporting it, offered an amendment which added the language "or for any alleged violation of any other criminal statute." The amendment was agreed to without further debate or explanation (96 Cong. Rec. 13761). The Conference Report carried this change, in substance, over into the bill as finally enacted (House Report No. 3112, *supra*, p. 7).

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute*. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received as evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation *of any other criminal statute*. Sept. 23, 1950, c. 1024, Title I, Sec. 4, 65 Stat. 991." (Emphasis supplied.)

of active participation in the activities prohibited" (Senate Report No. 1358, *supra,* pp. 19, 20).

The same committee drew upon the learning of Donald R. Richberg, Esq., in this connection and appended his memorandum to its report. His language makes plain the purpose to avoid convictions of crime based upon membership alone or together with constitutionally protected conduct:

> "It is true that a member of a political party or other loose organization should not be held responsible for personal violations of law by some officer or other member of the organization, *in which he did not participate or which he did not help to conceal* . . .
>
> "It will be seen that no individual is made guilty because of mere association with others. *He must do something himself which is made unlawful* . . .
>
> ". . . Since such an organization (*i.e.,* a 'Communist organization') is not outlawed it is evident that mere educational propaganda and campaigns for political reforms or to elect candidates to public offices are not made unlawful . . ." (Senate Report No. 1358, *supra,* pp. 32, 33; emphasis supplied.)

During the debate in the Senate, Senator O'Connor, a proponent of the bill and a member of the Committee on the Judiciary, stated that it was the purpose of the bill to make punishable "only overt acts" and to require "substantial evidence that the accused is engaged in an activity which is aimed at the overthrow of our form of government" (96 Cong. Rec. 14257).

It would therefore appear that the framers of the legislation purposed not simply to forbid convictions under "any . . . criminal statute" based upon mere membership or officership in the Communist Party, but also to

prohibit such convictions without evidence of actual participation in the activities which the statute proscribes. Membership and officership in the Party being *per se* lawful, they cannot impose criminality upon lawful activities; and the activities being in and of themselves lawful they cannot infect the lawful membership and officership. No matter how the formula is arranged, lawful activities and association not shown to be unlawful cannot by addition or multiplication be cemented into illegality. *Bridges v. Wixon*, 326 U. S. 135, 147; *Cf., United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 973 (D.C. S.D. Cal., 1942). Any other rule would permit a finding of guilt without proof of any incriminating fact and would thereby actually create a presumption of guilt. This the presumption of innocence does not permit. *Mitchell v. United States*, 88 U. S. 350, 353.

In urging that innocent activities within the Communist Party may properly lead to an inference of criminality, the respondent places its reliance upon the abhorrent dragnet device embodied in the doctrine of guilt by association. In conspiracy cases no less than in others "Guilt with us remains individual and personal." When individuals are tried in groups "every safeguard to individualize each defendant in his relation to the mass" is imperative. *Kotteakos v. United States*, 328 U. S. 750, 772-3. With respect to these very petitioners, in an earlier proceeding in this case it was said "Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity" (Mr. Justice Jackson and Mr. Justice Frankfurter concurring in *Stack v. Boyle*, 342 U. S. 1, 9).

An inference of participation in an illegal conspiracy drawn from lawful activities in association with others predicates guilt upon the association alone. This the law forbids in any conspiracy case. *Butler v. United States*, 197 F. 2d 561, 564-5 (C. A. 10, 1952). Freedom of association in a speech case may not thus be impaired without serious inroads into the truths we cherish as essential to a free nation. Yielding on the principle of freedom of association requires abandonment of the concept "that under our traditions beliefs are personal and not a matter of mere association." *Schneiderman v. United States*, 320 U. S. 118, 136. "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman v. Updegraff*, 344 U. S. 183, 191.

Freedom of speech can be exercised effectively only in a context of freedom of association. If speech may be tainted on the basis of association, the right to speak is lost together with the right to associate. They are cognate liberties, inextricably bound one to the other. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." *DeJonge v. Oregon*, 299 U. S. 353, 365. See also *Herndon v. Lowry*, 301 U. S. 242; *Cantwell v. Connecticut*, 310 U. S. 296; *Taylor v. Mississippi*, 319 U. S. 583; *Keegan v. United States*, 325 U. S. 478; *Burstyn, Inc. v. Wilson*, 343 U. S. 495; and *Baumgartner, Hartzel, Schneiderman* and *Klapprott, supra*.

It follows from all that has been said that the nature of each petitioner's activities as shown by the record must be scrutinized with great care to determine whether petitioner's connection with a conspiracy is supported by the evidence. If the activities are legal and particularly if they were carried on within the realm of the First Amendment, the judgment must fall. "Free discussion of the problems of society is a cardinal principle of Americanism—a principle we are zealous to preserve." *Pennekamp v. Florida*, 328 U. S. 331, 346 (citing *Murdock v. Pennsylvania*, 319 U. S. 105, 115; *West Virginia v. Barnette*, 319 U. S. 624, 639; *Thomas v. Collins*, 323 U. S. 516, 527, 530). Some of the First Amendment activities of petitioners may have appeared to respondent to be unwise or intemperate or unpatriotic. The holding of a Lenin Memorial meeting may have been classified as politically reprehensible by respondent. But no matter how such activities may be characterized, they were protected by the First Amendment. *Terminiello v. City of Chicago*, 337 U. S. 1; *Cantwell v. Connecticut*, 310 U. S. 296. The activities of all of the petitioners, as shown by the record, consisted of the lawful exercise in and through the Communist Party of First Amendment rights within the political arena. The practical effect of the convictions is to impair the right of free speech of these petitioners because of the fact that they are Communists and their protected activities were carried on as such. Communists have the same right to speak as all other persons and that right is not forfeited because they speak in and through their organization. Otherwise the "auspices" of speech rather than whether the "utterances transcend the bounds of freedom of speech which the Constitution protects" would determine the right to speak.

To apply the "auspices" test to any petitioner is the use of the Smith Act to deprive him of "the essence of his guaranteed personal liberty." *DeJonge v. Oregon*, 299 U. S. 353, 365-6. A law "so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom." *Herndon v. Lowry*, 301 U. S. 242, 258-9.

D. The Evidence Does Not Establish the Conspiracy Charged.

Not only is the evidence insufficient to establish any petitioner's connection with the conspiracy charged; it is insufficient to establish the conspiracy itself. With one exception,[79] the sum of the evidence, considered above, of the activities of the petitioners and of their co-petitioners during the period of the alleged conspiracy must be totalled to determine whether a conspiracy is made out as against any petitioner. *Keegan v. United States*, 325 U. S. 478, 488. As a minimum, essentially the same evidence required to establish the connection of two or more defendants with the conspiracy charged is essential to a finding of the existence of the conspiracy. The conspiracy cannot be proved through acts or declarations of alleged co-conspirators of the petitioners. *Bartlett v. United States*, 166 F. 2d 920, 924-5 (C. A. 10, 1948);

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[79]The evidence of the 1950 incident involving the question put by the F.B.I. agent as to whether a revolution was being planned by "bullets instead of ballots" (see p. 76, *supra*) was offered against petitioner Lambert only [R. 7620-1, 7671]. It may not be considered in determining the sufficiency of the evidence to establish the conspiracy, because that would require treating it as if it had been offered against all petitioners.

Wilson v. United States, 109 F. 2d 895, 896 (C. A. 6, 1940).

We do not consider here the specific evidence of the activities of the co-petitioners, which is dealt with in their own briefs. An examination of those briefs will reveal, we believe, that the evidence concerning co-petitioners' activities relevant to the manifestation of the alleged conspiracy adds nothing of substance to the evidence discussed in this brief.

There being no direct evidence of an agreement to embark upon the condemned enterprise, it is necessary to refer to the circumstantial evidence consisting of the activities of these fourteen individuals over a period of almost eleven years, the period during which it is charged the conspiracy was in existence. For this entire period there are not more than eight or nine ambiguous, equivocal and isolated statements attributed to some of the petitioners, by the paid testimony of hired informers or professional witnesses speaking from their hostile and untrustworthy memories, which so much as suggest the possibility that force and violence was referred to by any petitioner. In the three year period within the statute of limitations there is not a single such statement. For the very same reasons that this testimony does not suffice to establish any petitioner's connection with the conspiracy, it is insufficient to prove beyond a reasonable doubt or at all the existence of the conspiracy itself.

There is an additional and fatal deficiency in the evidence relating to the conspiracy. No matter what the individual petitioners said or did, absent adequate proof of "an actual agreement in the sense of a meeting of minds in the pursuit of a course of action according to a

common plan"[80] to engage in the forbidden advocacy, there can be no valid finding that the conspiracy existed. This proof may be circumstantial but it must exist and it must consist of more than the unrelated activities or chance statements of the petitioners; it must establish participation in the conspiracy "with knowledge of the agreement" *Dickerson v. United States,* 18 F. 2d 887, 893 (C. A. 8, 1927); *United States v. Tannuzzo,* 174 F. 2d 177, 179-80 (C. A. 2, 1949), cert. den. 338 U. S. 815; *United States v. Crimmins,* 123 F. 2d 271, 273 (C. A. 2, 1941); *Davidson v. United States,* 61 F. 2d 250, 253 (C. A. 8; 1932); *Linde v. United States,* 13 F. 2d 59, 61 (C. A. 8, 1926). As Judge Medina stated in *United States v. Morgan,* 118 F. Supp. 621, 634 (D.C. N.Y., 1953): "But, when all is said and done, it is the true and ultimate fact which must prevail. Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case . . ." To predicate a finding of conspiracy on arbitrary assumptions with respect to the requisite common understanding violates due process. *Morrison v. California,* 291 U. S. 82, 92-3.

If the sprawling and pervasive character of circumstantial evidence admitted in a conspiracy case is to be kept within limits promising some degree of certainty in the proof required to sustain a conviction, the evidence

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[80]Cousens, *Agreement As An Element in Conspiracy,* 23 Va. L. Rev. 898, 911 (1937); see also *Pinkerton v. United States,* 328 U. S. 640, 649 (1946), Mr. Justice Rutledge dissenting in part; *United States v. Andolschek,* 142 F. 2d 503, 507 (C. A. 2, 1944); *United States v. Crimmins,* 123 F. 2d 271, 273 (C. A. 2, 1941).

bearing upon a common understanding must be sharply delineated and its sufficiency evaluated. An indispensable prerequisite for this task is the precise definition of the joint enterprise charged in the indictment. Here it is the advocacy of violent overthrow of the Government and the organization of the Communist Party as a vehicle for that advocacy. The Communist Party is not the conspiracy and its organization *per se* is not an act pursuant to the conspiracy. Accordingly membership in the Communist Party is not membership in the conspiracy and joint action in the Party is not proof of the conspiracy. Only joint action directed towards the proscribed advocacy and to organize the Communist Party to *that* end, not some other, is probative of the existence of the conspiracy charged.

Assuming arguendo that some of the evidence relating to some of the petitioners could be said to support a finding, as to those individuals, of an intent to advocate violent revolution, there is no evidence whatsoever of a *common* plan to that end. The Communist Party, not being the conspiracy, the common membership therein given its largest scope is some evidence from which an inference of opportunity to conspire might be drawn. But that is not enough. The inference of opportunity is buttressed by no proof of its use by petitioners. The few isolated, equivocal disconnected incidents where revolution was discussed by or in the presence of a petitioner or where the language might by a strained construction be deemed to refer to violent revolution are empty of any common pattern in subject matter, manner of approach, circumstances of the utterance, timing or any other factor necessary to supply a foundation for an inference of a common design.

be torn from their context. This evidence, if believed, is proof certain of a rhetorical bent in the speech of this petitioner; it is concrete proof of nothing more—for her statement is as susceptible, if not more so, of a rhetorical construction as of any other.

In context, a reprehensible interpretation is unreasonable. According to the evidence, petitioner posed the necessity of women making their "household activities secondary" to the taking up "of the necessary arms side by side with the men." Making household duties "secondary" is certainly more consistent with expenditure of time in political activity than it is with the concept that women should become part of an attempt to overthrow the Government by violence. The testimony of this alleged oral declaration like the others found its way into the record after being filtered year by year through the understanding, recollection and bias of an exceedingly well paid informer—Timothy Evans (see pp. 88-89, *supra*). Such evidence affords no solidity for the series of inferences which are necessary if it is to support an ultimate finding of this petitioner's connection with the conspiracy charged.

These three alleged oral declarations, all outside the statute of limitations, constitute the only evidence of what the petitioner Stack said or did during this period.

(b) *Petitioner Spector.* The testimony that in 1945 or 1946, petitioner Spector while teaching a class gave specific reading assignments is one of the very few instances of any petitioner being directly associated by the evidence with particular Marxist-Leninist writings. One of the books referred to by petitioner Spector was "Foundations of Leninism" [Ex. 1, R. 1357]. It is

among the writings that petitioner Yates testified are part of a whole body of literature which she understood as not calling for the violent overthrow of our Government. The concepts embodied in this particular work are identical with and are just as open to this tenable conclusion as were those before the Court in *Schneiderman v. United States,* 320 U. S. 118, 148-58.

The petitioner simultaneously recommended for reading "The United Front Against Fascism" [Ex. 119, R. 661] which projected for the United States a program of peaceful political action, thus negating any inference that respondent would draw that the reference to "Foundations of Leninism" was tantamount to advocating the overthrow by force of our Government. Respondent assumes that petitioner Spector adopted the broad generalizations drawn from experience under highly autocratic and corrupt governments (contained in "Foundations of Leninism") as applicable to the United States instead of the specific proposals (made in "United Front Against Fascism") directed to actual conditions in the United States where political parties could freely compete for public acceptance. The former book itself emphatically warns that it is not to be warped by such undiscerning neglect of social and political reality: "Unable to approach the phenomena of real life concretely, some comrades who suffer from mental laziness substitute general, noncommittal *formulas* for a careful concrete study of the actual situation and the relationship of class forces" [p. 101; Ex. 119, R. 661; R. 1122].

Moreover the pamphlet on the United Front was dated eleven years later than the one on Leninism and was obviously presented by the petitioner as a more recent

view of Marxism-Leninism. Even more important it insists upon the reconstruction of "policies and tactics in accordance with the changing situation" [p. 93, Ex. 119, R. 661; R. 1120]. This entire pamphlet is predicated upon the proposition that the rise of fascism brought about a new world situation; it deals with a specific program of action (including for the United States the use of existing democratic channels to elect a people's front government to bring about desired changes) in the light of the new situation. When the recommended reading is considered together, as it must be (*Kammann v. United States*, 259 Fed. 192, 193 (C.A. 7, 1919), the reasonable inference which this evidence permits that this petitioner intended to advocate change through the democratic process precludes a contrary conclusion. *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665; *Knauer v. United States*, 328 U. S. 654.

The reading was recommended and was done in a Communist Party class. According to the respondent's theory the Communist Party is the very medium utilized by the conspirators for their claimed nefarious purposes. Certainly at this very class to which respondent's witness testified the true intent and purpose of the conspirators would be revealed rather than concealed. Yet there is not a single word of evidence indicating that the petitioner interpreted the writing as advocating the overthrow of the Government of the United States by force and violence. The "absence of overt acts" or declarations indicating that petitioner had adopted a blameworthy construction of the recommended reading decisively refutes respondent's contention (*Schneiderman v. United States*, 320 U. S. at 158-9).

The unsound inference that petitioner Spector understood the books involved to have the meaning respondent ascribes to them is but the first in a series of inferences essential to respondent's case. It must next be inferred that the reading was assigned for the purpose of making that understanding apparent to the students; next, that the purpose of making it apparent was to prepare the students to advocate or engage in acts of violence; next, that all this was done pursuant to a common design with the other petitioners and finally that this common design and petitioner's connection therewith thus found to have been present in 1945 or 1946 continued until 1948. The evidentiary facts testified to by a paid informer and the conclusions drawn by respondent thus separated from each other by a series of untenable or disputable inferences would substitute speculation for proof.

(c) *Petitioner Yates.* The "Mother Bloor" incident in 1945 (pp. 32-36, *supra*) and the one involving the 1947 raffling of the book [Ex. 251, R. 7810] "The History of the Civil War in the U. S. S. R." (pp. 36-37, *supra*) were both related in the testimony of the paid informer Daisy Van Dorn. The inner contradictions in the tales recounted by this witness, as well as the inconsistencies between her testimony and stipulated facts or other undisputed evidence, give them a quality of improvisation wholly inconsistent with veracity. If this testimony is to be given any weight, it must be found that the Party went to the trouble of smuggling into the United States 500 copies of a book, which had actually been cleared through Customs and copies of which were circulated by the Public Library of Los Angeles; that of 6 illicit copies allotted to California, one copy was raffled off at ten cents a chance at a minor and insignificant club meet-

ing; that, thereafter, the full significance of this book became apparent to the lucky winner, a paid F.B.I. informer, only upon a chance discussion with state or county officials of the Communist Party. An examination of the exhibit itself will reveal the complete absurdity of the whole story. It could no more constitute, to a sane person, a blueprint for revolution in the United States than a blow by blow account of the Civil War in France could have been used as an outline for the Civil War in the United States.

If this witness' testimony is trustworthy, the Communist Party planned a conspiratorial meeting, so highly confidential that ordinary rank and file members of the Party were to be kept unaware of it,[72] by scheduling it at the home of a non-Communist, by sending out printed announcements of the meeting and by inviting Daisy Van Dorn, who at that time had been a member of the Party for one month; at this highly conspiratorial meeting non-members of the Party, hostile to its alleged purposes, and chance drop-ins were present and photographs were taken of those in attendance; the speaker, appropriately enough an 83 year old woman known as Mother Bloor, mourned the death of President Roosevelt stating "we don't know about Truman, but we are going to give him a trial," while simultaneously inviting the audience to join her in the "bloody battles" of what she characterized as a "wonderful revolution" in order "to take over this country and run it in a socialistic manner"; in the

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[72]This apparently involved the rather neat device of utilizing the Communist Party to advocate violent revolution by concealing that fact from the rank and file of its members.

course of a speech in which she declaimed the glory of blood flowing in the streets she cautioned those present (Communists and non-Communists alike) that in order to be "a good Red Bolshevik" one must speak "slick, sly and smooth" and of course not roughly because people cannot be won that way; in this speech she said, on the one hand, that she hoped to live to see the peace-loving nations of the world, then gathered in San Francisco to form the United Nations, achieve "the final victory over the forces of fascism" and on the other that she "was so happy at being in San Francisco at this time on the eve of our great rebellion . . ."

(d) *Petitioner Carlson.* The witness Estrada testified that in 1947 petitioner Carlson talked of overthrowing the Government when in fact, as revealed by the contemporaneous written report prepared by the witness for the F.B.I., the petitioner spoke of resistance to fascism. The witness explained the apparent contradiction by saying that he equated resistance to fascism with overthrow of the Government (see pp. 54-55, *supra*). The witness Estrada thus distorted an incident into its opposite. If the written report had not been available, the petitioner Carlson would now be before this Court with unimpeached testimony against him, of his adherence to the use of guns in accomplishing a revolution in the United States. The record would not disclose that this had been fabricated out of his statements of support to Negro resistance against lynching and of opposition to "revolutionary action by the Fascists". Only rarely will a record so clearly reveal the wisdom of the proposition that the unreliability of evidence of unsworn oral declarations is redoubled when the declarations are filtered through

the uncomprehending mental processes of hostile informers.

(e) *Petitioner Fox.* In 1946 the petitioner Fox is reported to have said that he favored the "overthrow of this lousy system" but "the time and place for militant action . . . — had not arrived yet." Only by reading the concept of force and violence into these words is it possible to attribute to them any unlawful significance. The words "overthrow" and "militant" do not necessarily imply force and violence and the "overthrow" of a "system" is to be distinguished from the "overthrow" of a Government. Not only did the respondent fail to sustain its burden of proving that petitioner Fox was talking about *forceful* overthrow of the *Government* of the United States, but the circumstances under which the statements were allegedly made repel such a conclusion. Petitioner Fox spoke in response to the arguments of "leftists" who wanted to advocate socialism now without regard to the wishes of the majority of the people. The speaker regarded the position of the leftists as a mere "whim" and indicated that he desired to act militantly when the time came. In context this time referred to a period when the majority of the people desired the establishment of socialism, which militant action could be accomplished by peaceful means because it had majority support. At the very least, the language is as susceptible of this interpretation as it is of any other. Only by basing a series of inferences upon an arbitrary construction of the language as referring to overthrow of the Government by violence can the respondent impute guilt on this evidence.

B. Membership and Innocent Party Activities—the Only Substantial Evidence Against Any Petitioner—Respondent's Theory.

The charge is that the conspiracy began in 1940. For the eleven year period up to the time of the return of the indictment, there is, in addition to the evidence discussed above and relating only to petitioners Yates, Stack, Fox, Carlson and Lambert, only evidence of each of the petitioner's membership and officership in the Communist Party plus constitutionally protected activities therein. As the analysis of the strongest evidence against the five petitioners named above indicates, there is nothing in their declarations or activities which could sustain a finding of their connection with the conspiracy charged. The evidence which must be relied upon by respondent as to them and of course as to the remaining six petitioners, to establish such connection is membership, officership and activity in the Communist Party having no apparent relationship to advocacy of force and violence. This explains the reliance of the court below on testimony of participation in a Party Lenin Memorial called in support of the Bill of Rights and to protest the *Dennis* prosecution as an illustration of the kind of evidence held sufficient to establish a petitioner's connection with the alleged conspiracy as well as his specific intent to advocate and effectuate the violent overthrow of the Government.

Since the record is actually devoid of direct or circumstantial evidence which sufficiently establishes the guilt of each of the petitioners, respondent relied upon an abstract theory of guilt which was adopted by the courts below. The theory is bottomed upon a series of inferences pyramided by the respondent from proof alone of membership and officership in the Communist Party and

lawful activities therein. We discuss now the invalidity of this theory. Petitioners analyze, first, the theory in general. Then follows a discussion demonstrating that respondent's theory as to the inferred unlawful understanding and interpretation of Marxist writings is invalid both in fact and in logic. We show, further that respondent's own direct evidence refutes the baseless inferences which it draws. Then there is included a discussion of the legal precedents which uniformly condemn the process of conjecture, surmisal and guesswork in which the respondent and the courts below indulged.

1. Respondent's Abstract Theory of Guilt.

The convictions rest upon no evidence of express agreement to advocate the proscribed doctrine. Nor are they predicated upon any actual advocacy by these petitioners, whether in concert *inter se* or with others of the violent overthrow of the Government. The theory of respondent and of the courts below is based upon three proven facts: first, the Communist Party officially declares that "it subscribes to the principles of scientific socialism, Marxism-Leninism"; second, Marxism-Leninism is composed of a large body of writings, some of which speak of violent revolution in historical context, but none of which state that the Government of the United States should be overthrown by force and violence, and most of which repeatedly declare that the language in the writings is not to be taken literally and that the application of the principles of Marxism-Leninism depend upon time, place and circumstances; third, the petitioners were long-time Party members and officers, actively engaged in legal activities of the Party.

Upon the foundation offered by these facts, respondent has consistently sought throughout these proceedings to erect the following complex pyramid of inferences: first, Marxism-Leninism must be construed as calling for the violent overthrow of the Government of the United States; second, on the basis of this inference as to the meaning of Marxism-Leninism, it must be inferred that the Communist Party because of its advocacy of Marxism-Leninism advocates the overthrow by violence of the Government of the United States; third, from this inference as to what the Communist Party advocates, it must be inferred that long-time members and officers of the Party, including each of the petitioners, knew that the doctrines of Marxism-Leninism as construed by the Communist Party called for violent revolution in the United States; fourth, from this inference of each individual's knowledge, there must be an inference that each individual agreed with Marxism-Leninism and the objectives of the Party as thus construed; fifth, from this inference of individual agreement with the inference of the proscribed advocacy, an inference must follow that each of the petitioners entered into an agreement with the others to engage in such advocacy and to organize the Communist Party for that purpose.[73]

This remarkable series of inferences circle into a noose from which no long-time member of the Communist

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[73]From the inferred agreement to advocate violent overthrow of the Government and to organize the Communist Party to that end, it must be inferred that the agreement embraced a plan to advocate in language of incitement to action. This was respondent's position in the trial court when it proffered its instruction on incitement (see *supra*, p. 112, n. 69). A required seventh inference on the individual specific intent to accomplish the violent overthrow of the Government as speedily as circumstances would permit, will be discussed *infra*.

Party can free himself. It starts with inferences as to the purposes of the Party, passes on to inferences of conspiracy by individuals because of their membership in the Party and returns to inferences as to the purposes of the Party resulting from the inferred conspiracy of the members of the Party. All that is necessary to set in motion this chain of perpetual inferences is proof of membership in the Party and quotations from a pile of books. And the advantage of this methodology is that it creates the illusion that no one is being convicted merely because of Party membership or officership and that books are not on trial, while it permits the desired result to be achieved solely through proof of such membership and books. Nor does it matter that the various inferences are highly disputable and that they do not necessarily follow from the facts or the preceding inferences.

2. The Inferences Drawn by Respondent as to the Understanding and Interpretation of Marxist Writings, Imputed to Petitioners Without Evidence, Are Untenable in Fact and in Logic.

The inference that Marxism-Leninism equals advocacy of overthrow of the Government of the United States by force and violence is, according to the record in this case, a vulgarization of a complex system of human knowledge and beliefs which has been variously interpreted and applied depending upon the views of different individuals and groups and according to the diverse circumstances and conditions applicable at any given time. "The term Marxism-Leninism means the sum total, the teachings, policies and program of the Communist Party, the teachings of Lenin, Stalin, Marx, Engels, the programs of

the Communist Internationals, the sum total of the Communist Party program and policy as taught and advocated by the foremost exponents of Communism"—so speaks a prosecution witness [R. 2311]. This witness concedes that Marxism-Leninism has been elaborated on, correctly or incorrectly, in a thousand different ways by thousands of different people, and that what may appropriately be included within Marxist-Leninist writings is sometimes a matter of disagreement even among Communists; that these thousands of writings touch upon such diverse subjects as economics, politics, ethics, philosophy, science, art, culture and a variety of other matters; that not only is there often disagreement as to whether a particular writing conforms to the principles of Marxism-Leninism, but the concepts themselves are subject to constant change and development and the various writings attempt to apply the principles of Marxism-Leninism to specific problems and specific conditions at specific times [R. 2571-2602, 2625].

Nor, as another prosecution witness points out, is it a simple matter correctly to interpret Marxist-Leninist writings; for example, it takes more than one reading of Dimitroff's "Report on the United Front" to understand it because one reading might result in a wrong interpretation [R. 2657-9]. Even after reading and study, differences persist. A third prosecution witness testified that at an educational discussion of "The Paris Commune" [Ex. 492, R. 4408], there were pro and con views by members of his branch who differently interpreted certain features of this work [R. 4425-26]. "In each country individuals interpret and apply Marxism-Leninism to a given situation in a given territory in a

given time," is the testimony of still another prosecution witness [R. 2572].

The existence of differences among those who interpret Marxism-Leninism, and particularly among members of the Communist Party, is a bar to any inference from proof of membership and officership in the Communist Party, that any Communist Party member accepted one particular view of Marxism-Leninism. Here there is no direct evidence establishing or from which it may be fairly inferred that any petitioner understood Marxism-Leninism or the purposes of the Communist Party as incorporating the banned advocacy. There was much clear and unequivocal evidence to the contrary supported by quotations from Marxist-Leninist writings and official utterances of the Party. The inferences relied on by respondent require either the complete ignoring of the Party's position that socialism can only be achieved when the majority of the people desire it, as exemplified in part by the expulsion of the leftists who disagreed with this view, or the absurd conclusion that because Marxist writings supported the use of violence to achieve change in Czarist Russia when no democratic channels were available, these writings *must be construed* as insisting on violence in the United States even though the majority have available democratic channels through which changes can be effected.

In addition, some of the respondent's own witnesses indicated their own understanding when they were Party members that the application of Marxism-Leninism to the United States did not call for force and violence but proposed change through the democratic process, and some of these witnesses held office in the Party (see p.

95, *supra*). If a prosecution witness could have believed as a member and officer of the Communist Party that it advocated peaceful change, on what reasonable grounds may it be inferred that petitioners here understood the exact opposite by virtue of their relationship to the Communist Party?

Perhaps most important of all, these inferences realistically are irreconcilable with the absence of direct evidence that any petitioner personally taught, discussed or advocated a violent revolution in the United States. It has often been noted that, because conspiracies operate in secrecy, proof thereof must generally depend upon circumstantial evidence. Here, however, the eleven alleged conspirators for a period of eleven years were under the direct observation of paid representatives of the F.B.I. and of members of the Party who later became professional witnesses for the respondent. These bona fide and bogus members of the Party operated within the Communist Party, the organ of the alleged conspiracy—the place where its objects would necessarily be made known, if the conspiracy existed.

Respondent's theory is that the conspirators planned to use the Communist Party as an instrument for preparation of Party members for advocacy of the violent overthrow of our Government. The most logical place for the indoctrination requisite to the conspiracy was the Party schools. Yet for the entire eleven year period there is no evidence that any one of the eleven petitioners at any school or elsewhere said anything about violent revolution. Nor is there any evidence that anywhere any time, any petitioner stated that adherence to Marxism-Leninism or to the Communist Party required advocacy

of the forceful overthrow of the Government. The hired political spies and other hostile witnesses available to respondent had ample opportunity to observe what petitioners were doing within the inner workings of the alleged conspiracy and their testimony was hardly more favorable to the petitioners than the facts warranted. If respondent's theory had any factual substance, one would reasonably expect these petitioners, alleged leaders of the claimed conspiracy, to have made numerous clear-cut statements indicating their adherence to the doctrine of violent revolution in the United States. Under these circumstances, the absence of any evidence of such statements affords strong support for the conclusion that petitioners were not parties to an agreement to engage in the forbidden advocacy. *United States v. Di Re,* 332 U. S. 581, 593; *Wesson v. United States,* 172 F. 2d 931, 936 (C. A. 8, 1949).

The fact of the matter is that ideas, opinions, beliefs, philosophies and other concepts, when embodied in writings which flow out of particular and different historical settings, can have no single meaning and interpretation to all persons at all times. Proof of any individual's understanding and interpretation of writings which have "perplexed courts, administrators, legislators and students" (*Schneiderman v. United States,* 320 U. S. 118, 147) can only be established by proof of the individual's own "overt acts" clearly and unequivocally indicating his interpretation and understanding (*id.,* pp. 158-9). The absolute language of the First Amendment, for example, when examined in historical context, has been variously understood and interpreted by responsible citizens. See, the discussion by Justice Frankfurter in

Dennis v. United States, 341 U. S. 494, 521-5, and the differences in interpretation between Professors Meikeljohn and Chafee, noted in the same opinion (*id.*, p. 524, n. 5). The Thirteenth Amendment prohibits involuntary servitude, but despite the express language it has been interpreted and understood as not preventing military conscription. Chafee, *Free Speech in the United States* (1941), p. 8. If freedom of speech, press and assembly is to be preserved, it must be clear that persons cannot be imprisoned because of interpretations and understandings of writings imputed to them by a prosecutor, without clear and convincing proof of the accused's own acts and declarations adopting such understanding or interpretation.[74]

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[74]Referring to the Sedition Act of 1798, Madison stated: "But in the next place, it must be obvious to the plainest minds, that opinions and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinion, and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law." *Report on the Virginia Resolutions* in Elliot's Debates, vol. IV, p. 575. Thomas Clio Rickman, publisher of Paine's *Rights of Man*, wrote "on the absurdity of trial by jury in matters of opinion, and the folly of any body of men deciding for others in science and speculative discussion, in politics and religion. Is it not applying the institution of juries to purposes for which they were not intended, to set up twelve men to judge and determine for a whole nation on matters that relate to systems and principles of government? A matter of fact may be cognizable by a jury, and certainly ascertained with respect to offenses against common law and in the ordinary intercourses of society; but on matters of political opinion, of taste, of metaphysical inquiry, and of religious belief, everyone must be left to decide as his inquiries, his experience, and his conviction impel him." *Writings of Thomas Paine* (Wheeler ed., 1908), vol. I, p. 49.

It will be urged that the petitioners' common enterprise may be found beyond a reasonable doubt from a finding of mutual adherence to Marxism-Leninism. Aside from the pyramiding of inferences required to reach this conclusion, the argument as a practical matter treats the Communist Party as the conspiracy and must fail for that reason. Or worse yet, it treats adherence to Marxism-Leninism as the connecting link between the petitioners, thus creating a giant conspiracy embracing everyone who subscribes to this body of thought. In either event the conspiracy loses all form and becomes a legal weapon with no more precision in selecting its objectives than is possessed by an atomic bomb. It envolops an entire area of human beliefs and endangers all those whose thoughts might venture within its broad limits.

The theory of conspiracy here is on this score quite different from *Dennis*. In that case this Court rested its decision upon the "necessary finding" that a small compact group of men, "the leaders of the Communist Party in this Country" utilized their control of the Communist Political Association "to transform that organization into the Communist Party" and to establish for it "a policy which worked for the overthrow of the Government by force and violence." Those defendants were all members of the same governing body of the Party and whatever they did was done jointly.[81] Thus in *Dennis* the result was predicated not simply upon the defendants' position of control of the Party apparatus, but their claimed use of that position *jointly* to plan and carry out their agree-

[81] Whether a review of the evidence in that case by this Court would have shown, as petitioners believe, that the record did not support, by clear and convincing evidence, the conclusion accepted by the Court is immaterial as far as this case is concerned.

ment to engage in the unlawful advocacy (341 U. S. 494, 498).

There is no comparable evidence in this record. Petitioners are shown to have held a variety of offices in the Party at different levels and with different titles and responsibilities. They are represented neither to have operated as a homogeneous group exercising common powers nor to have jointly organized or determined any policies for the Communist Party. They were never members of the same body within or outside of the Party. They operated on different levels of the Party structure, varying from a few national offices for two or three of the petitioners to relatively minor and separated local offices for several others.

The naming of the *Dennis* defendants as co-conspirators adds nothing but gloss to the case. The relatively minor positions in the Party of most petitioners, their geographical isolation from and infrequency of contact with the *Dennis* defendants, limited primarily to a few of the petitioners on a few occasions attending national conventions at which some of the *Dennis* defendants were present makes "it plain how little evidence there is in the record to convict them of a nation-wide conspiracy" *Keegan v. United States*, 325 U. S. 478, 492.

The indictment charges the petitioners, as part of the conspiracy, with "concentrating on recruiting persons employed in key basic industries and plants" [Clk. R. 1-3]. The record does indicate that some of the petitioners were concerned with the Party's policy of "concentration." But it reveals that this concern arose out of the fact that they believed that the Party should be primarily a workers' organization and that, for this reason, recruiting

should be concentrated at the places where workers were to be found, and particlularly where they worked in the largest numbers and possessed the greatest influence. There is no evidence that any petitioner supported the "concentration" policy for the purpose of gaining adherents for the proscribed advocacy. Their "concentration" is no more heinous than the concentration of a business men's organization on membership of business men, and particularly on those in the largest and most important industries.

The indictment also alleges that petitioners would "carry into effect detailed plans for the vital parts of the Communist Party to go underground in the event of emergency and from said underground position continue in all respects the conspiracy" [Clk. R. 1, 3]. The evidence in this record indicates that the term "underground" as used by the respondent's witnesses, testifying concerning it, referred to conduct of Party affairs in secrecy in order to avoid illegal harassment and persecution, to permit the carrying on of the legal activities of the Party and to seek to maintain it as a legal organization. The record is barren of evidence showing that the secrecy was designed as a cover for illegal advocacy or as a means of preparation therefor. This understandable endeavor of an organization to use legal means to protect itself (for there is nothing *per se* illegal in secrecy) cannot rationally be twisted into proof of wrongdoing.

Respondent relied in the courts below on the Party doctrine of "democratic centralism" as establishing that petitioners were part of a tightly knit organization arbitrarily controlled by its top leadership and accepting and unquestioningly carrying out its orders. Even if the

record showed this to be the case, which it did not, nothing unlawful is established thereby. An organization having the undemocratic characteristics which respondent attributes to the Communist Party may be socially reprehensible but it is not criminal. Only when the organization regardless of its structure is used by individuals for illegal purposes may penal sanctions be invoked. It is precisely such use of the organization which the evidence fails to establish against any petitioner.

In addition the record in this case negates respondent's contention as to the meaning of this doctrine, and, what is more important, as to its application in practice. In this case there is no evidence intimating that democratic centralism had a different meaning for petitioners than that given it in the Party Constitution. That document gives every member "not only the right but the responsibility to participate in the making of its policies and in the election of its leading committees, officers and delegates." After decisions are arrived at by "a majority vote" they are binding on all members, subject to the right of appeal to higher bodies. All members "have the right and duty to examine the execution of policies." Provision is made for recall of officers and for expulsion of members only following charges and a trial [Art. IV, Ex. 153, R. 208].

The prevalence of disagreement and debate within the Party appears throughout the record (See p. 83, n. 56, *supra*). It appears from respondent's witnesses that when they disagreed with the Party policies they were free to criticize and when their differences reached a breaking point they were free to terminate their membership.

It seems inconceivable that a comparable showing with respect to a trade union, a fraternal organization or a

church would afford a tenable basis for pinning a label of criminality upon it. But if the Communist Party and its members can be thus denounced, these other organizations will retain no invulnerability should their views chance to become extremely unpopular.

The sufficiency of the evidence of a conspiracy as charged depends upon proof of an agreement to engage in advocacy as charged. The deficiency in this essential proof cannot be overcome constitutionally by evidence that the Communist Party embraces the organizational principles of "democratic centralism."

The respondent's theory on the one hand disavows that its objective is to outlaw the Communist Party by treating it as a conspiracy. On the other hand it provides the basis for the conviction of any person in the United States solely upon evidence of active membership in the Party. In a conspiracy case, it is the agreement which is the common tie between defendants making each conspirator responsible for the conduct of the others. To sustain a finding of conspiracy where the only tie between the defendants is common membership or officership in the Communist Party is to employ the concept that the Party is the conspiracy. The following language from the decision of the Federal Trade Commission in *National Paper Trade Ass'n* (3 C.C.H. Trade Reg. R. Par. 25, 194, Sept. 25, 1954) rings out in protest against the indiscriminate coadunation of members of an organization on a conspiracy charge.

> "When the Government attempts to parley a conspiracy suit valid against a hundred defendants into a cease and desist order against a thousand for no reason other than that they all belong to trade

associations, it's time we took one look at the charge, two at the evidence, and three long looks at the procedures which defile so many on so little.

"The procedure involves the combination of a conspiracy charge and a class suit with a finding of guilt by association."

Cf. Lawson v. Hewell, 118 Cal. 613, 620, 50 Pac. 763 (1897).

Petitioners were not required to forego lawful activity as Communists because it is supposed that others might use the fruits thereof for unlawful purposes. To hold petitioners criminally responsible for their activities it must be shown by their conduct that they were parties to an understanding having the unlawful objectives. *United States v. Falcone,* 109 F. 2d 579, 581 (C. A. 2, 1940). The purpose of respondent in naming the *Dennis* defendants as "co-conspirators" appears to have been to taint the lawful activities of petitioners as Communists by an osmotic transfer of the finding of conspiracy which led to the *Dennis* convictions. The use of this device "is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders" (Judge Learned Hand, op. cit.).[82]

This Court has held that members of an association "are not subject to either criminal or civil liability" for the conduct of the officers or of the association "unless it is shown that they personally authorized or participated

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[82]Petitioners do not intend by the foregoing or by anything else in this Petition to concede that *Dennis* was correctly decided. It is hoped that the Court will reconsider that decision. However, even within the framework of *Dennis,* this case was wrongly decided.

in the particular acts." *United States v. White*, 322 U. S. 694, 702. A different principle would render membership in an association so fraught with danger to the individual as to denude the freedom of association guaranteed by the First Amendment. That right of association must be preserved for all, including Communists, if it is to afford a haven for dissent by any minority.

E. The Evidence Does Not Establish the Requisite Specific Intent of Any Petitioner.

Individual specific intent is a separate and essential element of the offense and like all other such elements must be proved by the prosecution beyond a reasonable doubt. *Hartzel v. United States*, 322 U. S. at 687; *Herndon v. Lowry*, 301 U. S. at 260. In discussing the insufficiency of the evidence to establish connection with the conspiracy, the inadequacy of the evidence on intent has largely been covered. However, there are certain additional observations pertinent to this issue.

In this case in addition to proof of intent "deliberately and with a specific purpose" to engage in the unlawful advocacy and to combine with others to that end (*Hartzel v. United States*, 322 U. S. 680, 686-7), "the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence" *Dennis*, 341 U. S. at 499; *Cf. Screws v. United States*, 325 U. S. 91, 101; *Musser v. Utah*, 333 U. S. 95, 97; *Winters v. New York*, 333 U. S. 507, 519-20; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89-93; *Champlin Ref. Co. v. Corporation Commission*, 286 U. S. 210, 242; *Smith v. Cahoon*, 283 U. S. 553, 564. The importance of clear and convincing proof on this "essential element"

was underscored by this Court's declaration that any doubt with respect thereto presented constitutional issues demanding that the record be reviewed with scrupulous care (op cit. at 516).

Intent being a state of mind imposes a highly individualized burden of proof sustainable only by evidence of each individual's own conduct and words, including of course his knowing assent, evidenced by conduct or words, to the conduct or words of others. The record must reveal "the actual condition of the defendant's consciousness." Holmes, The Common Law, 56; see also Mr. Justice Holmes' dissent in *Abrams v. United States*, 250 U. S. 616, 626, referred to with approval in *Dennis*, 341 U. S. at 515. Obviously what lies in a person's consciousness cannot be gleaned from events outside his knowledge or comprehension. The declarations and conduct of an organization or of its members not brought directly home to the accused are not probative of his intent. *United States v. White*, 322 U. S. 694, 702-3; *Superior Engraving Co. v. National Labor Relations Board*, 183 F. 2d 783, 795 (C. A. 7, 1950); *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 971 (D.C. S.D. Cal., 1942).

In a strict sense the ascertainment of the thoughts lying in the mind of man can never be directly ascertained. No X-ray equipment has been invented which enables us to view knowledge or ideas. Nor can they be tasted, smelled or touched. The most immediate approach to perception of what an individual knows or thinks is through the examination of his words whether written or oral. But words are insecure guides at best. This is so even where the words appear to be clear and unequivocal and susceptible of only one reasonable interpretation. Prob-

lems of semantics, context and circumstances constantly arise. And often we find the circle completing itself because what is meant by words may depend upon the intent with which they are uttered. Still and all what a man says is the most direct kind of evidence available of what he thinks.

Absent this most direct evidence the discovery of what an individual thinks may most clearly be ascertained by examining what he does in the light of what he knows. What he does illuminates his understanding and state of mind with respect to what he knows. Such evidence while not the most direct is perhaps the most reliable evidence of state of mind. For conduct is directly perceivable and is generally more certain in its characteristics than words. It offers the most dependable crucible for the distillation of intent from the expression of knowledge or ideas.

In the domain of the intellect suppression flouts democratic processes. Nevertheless the law, as it now stands, deems certain concepts so reprehensible that they may be punished when action with respect to them is contemplated even though it is not imminent.[83] Such a doctrine is that of the overthrow of our Government by force and violence. Acknowledging that free speech is threatened by the suppression of even such speech, courts have sought to minimize the danger by the requirement of strict standards of proof. Unless language is so direct, unequivocal and consistent that only one construction is reasonable, a reprehensible construction thereof will not be imputed to an individual, absent evidence of overt acts establishing that

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[83]This itself of course renders speech less than completely free.

such was his interpretation. *Schneiderman v. United States*, 320 U. S. at 158-9.

As has been noted above, knowledge affords the context in which the overt acts must be evaluated. Knowledge itself being a state of mind cannot be known through any of the five senses. Therefore the courts must rely upon evidence of the matters to which his mind has been exposed. When a complex body of thought is the subject matter of the knowledge a host of uncertainties confronts the trier of the fact. For what an individual knows are the precepts of which he is aware filtered through his own understanding derived from the sum total of his prior experiences. With these problems in mind, reviewing Courts' frequent refusals to accept findings of knowledge and intent based upon evidence which leaves the issue open to doubt can be given their full significance. *United States v. Falcone*, 311 U. S. 205; *United States v. Gardner*, 171 F. 2d 753, 756 (C. A. 7, 1948); *Kuhn v. United States*, 26 F. 2d 463 (C. A. 9, 1928); *Weniger v. United States*, 47 F. 2d 692 (C. A. 9, 1931); *Mazurosky v. United States*, 100 F. 2d 958 (C. A. 9, 1939); *Goodman v. United States*, 128 F. 2d 854 (C. A. 9, 1942); *Caldwell v. United States*, 139 F. 2d 121 (C. A. 5, 1943); *United States v. Haim*, 114 F. 2d 566 (C. A. 2, 1940); *Muyres v. United States*, 89 F. 2d 784 (C. A. 9, 1937); *Tingle v. United States*, 38 F. 2d 573 (C. A. 8, 1930); *Fulbright v. United States*, 91 F. 2d 210 (C. A. 8, 1937); *Lee v. United States*, 106 F. 2d 906 (C. A. 9, 1939); *United States v. Penn*, 131 F. 2d 1021 (C. A. 2, 1942). See also, *United States v. Di Re*, 332 U. S. 581, 593; *Keegan v. United States*, 325 U. S. 478, 488-95.

These it would seem are some of the considerations which have led this Court to hold that on issues of intent,

particularly where the intent is related to a body of opinion "regarding the whole nature of our Government," "proof is treacherous and objective judgment, even by the most disciplined minds, precarious" *Baumgartner v. United States*, 322 U. S. at 671, 675. Because a major dividing line between constitutionality and unconstitutionality in the application of the Smith Act is proof of the evil intent, the very liberties of the people depend upon the quality of the evidence deemed sufficient to uphold a finding thereof. The safeguarding of these precious interests demands that anything less than proof so certain that it leaves no troubling doubts be rejected as insufficient proof of intent.

To predicate a finding of intent upon the ultimate of a long sequence of inferences, particularly where each of them rests on hazardous deductions, makes of the constitutional requirement of proof of intent a cloak for, instead of a safeguard against, the destruction of constitutional rights. It is the former function which has been performed here. The evidence bearing upon each petitioner's intent, except for one incident involving the petitioner Stack,[84] and admitted in evidence solely as to her

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[84]In 1934 petitioner Stack, according to the witness Patterson, said she had training in the use of violence while attending the Lenin School in Moscow (see pp. 86-88, *supra*). The slight value, if any, of this testimony because of its remoteness rendered its admissibility extremely doubtful. *Boyd v. United States*, 142 U. S. 450; *Hall v. United States*, 235 Fed. 869, 871 (C. A. 9, 1916]; *Kammann v. United States*, 259 Fed. 192, 194-5 (C. A. 7, 1919); *Crowley v. United States*, 8 F. 2d 118, 119 (C. A. 9, 1925); *Flood v. United States*, 36 F. 2d 444, 446 (C. A. 9, 1930); *Boyer v. United States*, 132 F. 2d 12, 13 (C.A. D.C., 1942); *Cf. United States v. Rossi*, 182 F. 2d 292, 293, (C. A. 2, 1950); *Wolcher v. United States*, 200 F. 2d 493, 497, 499-500 (C. A. 9, 1952.) Moreover this incident occurred six years before the enactment of the Smith Act and it therefore cannot establish an intent to engage in advocacy which only became unlawful upon

intent, has been considered above in the general discussion of petitioners' connection with the conspiracy. The respects in which the evidence is insufficient to establish participation in an agreement to advocate violent revolution are applicable with even greater force to the evidence as it relates to an intent to achieve a violent revolution. The weakness and lack of solidity of this evidence are multiplied when an attempt is made to burden it with the inference of specific intent to actually accomplish the overthrow of our Government by violence.

It is inconceivable that these petitioners could have intended the violent overthrow of the Government of the United States and never once during the many years they were under observation have said so. The complete absence of evidence that any petitioner announced an intention to call for the violent overthrow of our Government is a fatal defect in the respondent's proof. *Cf. Hartzel v. United States,* 322 U. S. 680, 687. The Communist Party, according to respondent's theory, was the vehicle to be used at the appropriate time to carry out the object of the conspiracy charged; the members of the Party were to be imbued with that object so that they would be prepared to advocate and incite to violence when

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the enactment of that law. *Wolf v. United States,* 259 Fed. 388, 393 (C. A. 8, 1919); *Langer v. United States,* 76 F. 2d 817, 827 (C. A. 8, 1935). The witness neither recorded the oral conversation at any time nor discussed it with any one for a period of 16 years. His reliance on his unaided and biased recollection further decreases the probative value of the testimony. The conversation as reported by him is inconsistent with the absence of any evidence relating to petitioner Stack for the next 11 years. For it apparently contemplated imminent action of some kind in furtherance of the teachings. The lack of evidence of action of any kind, even though the witness Patterson for the next several years had an opportunity to observe the petitioner, completely eliminates any value of the evidence in establishing intent.

the conspirators thought the time ripe. With such indoctrination as an objective, it is odd indeed that the purpose was not declared by the alleged conspirators at the clubs, schools and meetings of the Party, the "conspiratorial" forums supposedly established for such indoctrination, at which petitioners were under observation day after day and year after year by F.B.I. agents and by bona fide members who later turned against their former friends and testified for respondent.

Petitioners were shown to have been connected with the Communist movement for a minimum of seven to a maximum of eighteen years, a collective total of 160, and an average of more than fourteen years. Even as to petitioner Kusnitz, whose earliest established connection with the Communist Party was only seven years before the indictment was returned (less than for any other petitioner), the failure to establish that she ever said or wrote anything even intimating, let alone declaring, an intent to accomplish the violent overthrow of our Government constitutes a gap in the proof which demands a reversal as to her.[85] When it is considered that in the total cumulative 160 years of activity in the Communist Party by the eleven petitioners there is not a single state-

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[85]The strength of respondent's case against this petitioner is indicated by the fact that it found it necessary to bring a witness from New York solely for the purpose of testifying that at a Party meeting in 1943, petitioner Kusnitz called for greater activity by women because so many men were in the armed forces (p. 70, *supra*).

ment, written or oral, attributed to any one of them stating an intention to accomplish the forceful overthrow of this Government, the hollowness of respondent's case where solidity of proof is essential becomes glaringly apparent. The evidence in this case is far weaker than that held insufficient to establish intent in numerous other cases. *Cf. Baumgartner v. United States,* 322 U. S. 665; *Hartzel v. United States,* 322 U. S. 680; *Keegan v. United States,* 325 U. S. 478; *Hall v. United States,* 256 Fed. 748 (C. A. 4, 1919); *Wolf v. United States,* 259 Fed. 388 (C. A. 8, 1919); *Orth v. United States,* 142 F. 2d 969 (C. A. 4, 1944); *Bergmann v. United States,* 144 F. 2d 34 (C. A. 9, 1944); *Bechtel v. United States,* 176 F. 2d 741 (C. A. 9, 1949); *Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953); *United States v. Hauck,* 155 F. 2d 141 (C. A. 2, 1946); *Meyer v. United States,* 141 F. 2d 825 (C. A. 5, 1944); *Annett v. United States,* 205 F. 2d 689 (C. A. 10, 1953). See also, *Ward v. United States,* 344 U. S. 924, *per curiam* decision, reversing 195 F. 2d 441 (C. A. 5, 1952). If the same measure of proof is applied in this case, each petitioner is entitled to a reversal because of lack of evidence of specific intent.

F. The Evidence Does Not Establish the Power of Any Petitioner Individually or as a Member of Any Group to Bring About the Evil at Which the Statute Is Aimed.

In *Dennis,* the Supreme Court said, "Where there is doubt as to . . . . the defendants . . . power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. at 516). The evil at which the statute is aimed is "armed rebellion" or an "attempt to overthrow the Government by force" (341 U. S. 509).

The petitioners in the *Dennis* case comprised a homogeneous group, the National Committee of the Party, and as such wielded the top executive authority in the Party and, between biennial conventions, its supreme policy-making powers. In *Dennis* the facts allegedly established the formation by the petitioners in that case of a "highly organized conspiracy, with rigidly disciplined members subject to call [to attempt an armed rebellion] when *the leaders, these petitioners,* [in the *Dennis* case] felt that the time had come for action . . ." (341 U. S. at 510-11, emphasis added). Thus it was found that the petitioners in that case could when they believed it desirable bring about an attempt at armed rebellion; this was the requisite "power to bring about the evil."

The record in this case is barren of any proof that the petitioners individually or collectively or together with others possessed any such power.

The petitioners here held Party positions that were widely disparate in title, function and authority. So far

as the record shows they never met together as a group and were not jointly vested with any authority. No one of them occupied a position whereby individually or as one of a group of persons he possessed powers remotely comparable to those which the *Dennis* petitioners wielded according to the findings in that case. Entirely aside from the lack of evidence in other respects, the record is devoid of evidence from which it might even be inferred that any petitioner had a voice in determining whether or when a call for a violent revolution should be announced.

The First Amendment obstacle to the conviction cannot be bridged with such a breach in the proof. The right to speak does not depend upon a governmental seal of approval; it may not be denied absent some proximity to unlawful action, which though it may vary in degree, dependent upon the nature of the evil, must nevertheless exist. *Dennis,* 341 U. S. at 510-13. An intent to accomplish a violent revolution has no realistic relationship to action to that end unless the ability to trigger the attempt exists. An individual may have the intent to move mountains, but unless he commands the necessary machinery or manpower, the attempt can never be made. There being no evidence that petitioners individually or as members of a body within the Party possessed the effective authority to command an attempt at violent revolution, there is no proof of power to bring about the evil or a "clear and present danger" emanating from it.

Summation.

These petitioners were not convicted because the evidence established that they were parties to a conspiracy or that they either intended or had the power to initiate an attempt at violent overthrow of the Government. The technique of the respondent in trying the case virtually precluded, in times of great national and international emotion around the issue of Communism, any fair or reasonable consideration of these issues by the jury. By far the greater part of the trial was taken up with the introduction of Marxist-Leninist writings, upon a showing that they were read or studied or distributed within the Party, and with the reading therefrom of carefully selected inflammatory passages (relating to other countries, times and conditions) torn out of context, containing unfamiliar and therefore frightening words and phrases such as "dictatorship of the proletariat," "revolution," "class struggle," "dialectical," and "democratic centralism." The attempt to explain the possible interpretations of these passages in the light of the whole body of Marxist-Leninist theory could be successfully undertaken in a college course, given an unbiased instructor seeking knowledge rather than conformity. In a trial before a jury in the atmosphere existing at the time of this trial, conducted by a prosecution bent upon using the books in a manner designed to obtain a conviction, this was impossible. What happened in this case is that human beings were indicted and books were put on trial.

II.

The Evidence Is Insufficient to Establish That the "Overt Acts" Alleged and Proved Were in Furtherance of the Conspiracy Charged in the Indictment and to Effect the Objects Thereof.

A. This Court has never had occasion to construe the "overt acts" provision of the general conspiracy law (18 U. S. C., Section 371) as applied to Smith Act prosecutions (18 U. S. C., Section 2385).[86] Since a charge of conspiracy to advocate and teach the forcible overthrow of the Government involves an element of speech in both the agreement and the object of the agreement, the requirement of allegation and proof of an "overt" or "open" act in furtherance of the agreement and to effect the object thereof takes on important legal and historical significance.[87]

So far as is relevant here, the statute (18 U. S. C., Section 2385) punishes only those who advocate and teach the overthrow of the Government of the United States by force and violence and those who organize any assembly of persons who advocate or teach "the overthrow or destruction of any such government by force and violence." The statute does not purport to make it

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[86]The 1948 consolidation of the Criminal Code by the Congress differentiated between prosecutions for conspiracy to forcibly overthrow the Government (18 U. S. C., Sec. 2384) and Smith Act prosecutions. In the former case, allegation and proof of "overt acts" were not required. See Reviser's Notes, 18 U. S. C. Sec. 371.

[87]Blackstone, in discussing the reasons for the "overt act" evidentiary rule in treason cases, states: ". . . the principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies which have been the engines of profligate and crafty politicians in all ages." Comm. (Jones ed., 1916), Book IV, Ch. 27, Sec. 403, p. 2596.

an offense to advocate or teach the ineptitude of governmental policies or officials; nor does the statute punish any person who organizes or helps to organize an assembly who so advocate and teach. The Smith Act does not make it an offense for the Communist Party or its members to advocate and teach, and it is not a crime under the Smith Act to organize or help to organize the Communist Party.[88]

Under the law (18 U. S. C., Section 371), the burden rested upon the prosecution to allege and prove at least one "overt act" which would show that the agreement alleged in the indictment had passed beyond the mental stage and was, "on foot." As the Statement of the Case indicates *(supra,* p. 105), the only two overt acts alleged and proved within the period of the statute of limitations were "overt acts" numbered "13" and "16." Despite the absence of evidence in support of the other "overt acts" alleged in the indictment, none of these other "acts" were withdrawn before submission of the case to the jury.[89]

The proof of the "overt acts" comes down to this: On two separate occasions, public meetings were held in Los Angeles sponsored by the Communist Party. The meetings were publicly attended by about 1500 to 1700 per-

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[88]"There is no necessary identity in law between Communist Party members" and "members of organizations advocating the overthrow of the government." Justice Reed in *Bridges v. United States,* 346 U. S. 209, 234.

[89]Under the general verdict, it is not possible to now determine whether the conviction rested solely upon the alleged "overt acts" proven, or upon the "overt acts" alleged, but not proven. *Cf. Cramer v. United States,* 325 U. S. 1, 36, n. 45; *Haupt v. United States,* 330 U. S. 631, 641, n. 1; *Stromberg v. California,* 283 U. S. 359, 368; *Williams v. North Carolina,* 317 U. S. 287, 292. For this reason alone, a judgment of reversal is required.

sons on each occasion. There is no evidence of what was said or done at these meetings except that it was stated that they were Lenin Memorial meetings. A newspaper reported that the first meeting would serve primarily as a protest against "the current trial in New York of 12 national leaders of the party"; and the same newspaper reported that at the second meeting one of the petitioners spoke on the "key issue" of China, and demanded to know the position of certain named Congressmen on trade with and recognition of China. It should be noted that the prosecution witness who testified to attendance at these public meetings added nothing more than the fact that he had seen one of the petitioners chair a meeting and heard two others speak, but there was no testimony as to the content of the speeches. No evidence was adduced that the meetings were other than peaceable; there was no evidence that any violent or seditious language was used; there was no evidence that any literature or writing of any kind was distributed at these meetings; there was no evidence of any solicitation of persons to join the Communist Party. Indeed, there is not the slightest evidence in the entire record which in any way relates these two meetings with any other proof in the case.

The question thus presented is whether the evidence of such "acts" was substantial enough to establish that the alleged conspiracy was "in execution" and to justify the submission of the case to the jury for their finding of guilt beyond a reasonable doubt. It is of course settled that without proof of an overt act, a "charge of conspiracy cannot be submitted to the jury." *Braverman v. United States*, 317 U. S. 49, 53.

B. The maxim that "the will is taken for the deed," that a guilty intention alone is punishable, was never seriously accepted in English law. Radin, M., *Intent, Criminal* in VIII Cyc. Soc. Sci. 127. "They [the rules of law] whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct." Kenny, *Outlines of Criminal Law* (15th ed., Camb. 1936), p. 40. "'So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing.'" Coke, Inst. III, p. 5. "'The thought of man shall not be tried, for the devil himself knoweth not the thought of man':—thus at the end of the middle ages spoke Brian C. J. in words that might well be the motto for the early history of criminal law." Pollock and Maitland, *History of English Law* (2nd ed., 1909), II, p. 474.

In early English history, the aforesaid principle was always observed in the letter, but rarely in the spirit. The "violently artificial" interpretations of the treason statute of Edward III, which made even the gathering of a peaceable assembly for obtaining parliamentary reform an "overt act" compassing the death of the King (May, *Constitutional History of England* (1880), II, p. 157), were intended to assure the stability of the reign, but they only facilitated acquittals in treason prosecutions because of "the popular dislike to strained interpretations of the law." Kenny, *supra*, p. 316. Even under the famous Treason Statute (25 Ed. III), however, the bare confederacy or conspiracy to kill the King was not treason; "but if the conspirators do provide any weapon, or other thing, to accomplish their devilish intent, this

and the like is an overt act to make it treason." Coke, Inst, III, p. 38. Yet, subsequent judicial interpretation extended the meaning of the treason clause to include "anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office." Ploscowe, M., *Treason* in XV Cyc. Soc. Sci., p. 95. Virtually any volitional act—utterances, writings or ordinary breaches of the peace—were construed as "overt acts" tending to undermine the "King's government." Kenny, *supra*, p. 315.

It is small wonder that the treason provision in the Constitution is so narrowly drawn. "The framers of the Constitution of the United States were aware of the fact that constructive treasons had been employed to exterminate political offenders in England. In order to prevent such abuses the framers inserted in the Constitution a very restrictive definition of treason." Ploscowe, *supra*, p. 95. As Justice Jackson stated in *Cramer v. United States*, 325 U. S. 1, 28: "The concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both definition of the crime and procedure for its trial."

If we consider the historical abuses against which the framers of the Constitution inserted the restrictive treason provisions, it would appear clear that the procedural safeguards there provided to guard against "constructive treasons" should serve at least as a frame of reference for prosecutions against conspiracies to incite to the forcible overthrow of the Government. The key to the protection of the individual in the treason clause lay in the requirement of an "overt deed" clearly and unequivocally

manifesting, without dubious inference, a specific intention to commit the offense. *Cramer v. United States*, 325 U. S. 1.[90] It should be recalled that alleged attempts at forcible overthrow of the Government were brought by the common-law judges within the compass of the treason statutes. In the trial of Lord Essex, the judges stated that "in every Rebellion the law intendeth as a consequent the compassing the death and deprivation of the King." 2 St. Tr. (1600) 1333, 1335 quoted in Ploscowe, *supra*, p. 95. Lord Gordon was indicted for high treason for allegedly inciting a tumultuous assembly to intimidate the Parliament and compel the repeal of certain Toleration Acts. The charge was that the accused had committed treason by "levying war against the King in his realm." In obtaining the defendant's acquittal, Thomas Erskine successfully argued that the "act" of presiding at a peaceable assembly could not be converted into an "overt act" of levying war. The treason statute, he argued, was confined "to acts which immediately,—openly,—and unambiguously, strike at the very root and being of government." There must be "premeditated, open acts of violence, hostility, and force;—nothing equivocal;—nothing ambiguous;—no intimidations, or overawings, which signify nothing precise or certain." 21 St. Tr. 590.

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[90]Madison stated:

> "But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author." *Federalist*, No. XLIII.

Thus, the crucial issue in all treason cases and cases involving alleged attempts at forcible overthrow of the Government became the question of the proof of the "overt deed." There appears to be no doubt that the founders, by the adoption of the Constitution and the Bill of Rights, were determined that there should be no convictions for treason or offenses akin to treason, upon proof only of the exercise of wholly innocent acts of speech, press or assembly. Chafee, *Free Speech in the United States* (1941), pp. 172-73, 186, 396; Hurst, *Treason in the United States* in 58 Harv. L. Rev., 395, 417-44 (1945).[91] See also, Brandeis J. in *Schaefer v. United States*, 251 U. S. 466, 493.

C. The aforesaid discussion is not intended to raise in this proceeding the power of Congress to create new offenses which at one time in history were covered by the charge of treason, nor to urge that the "two-witness" rule be made applicable to such cognate offenses. What

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[91]Willard Hurst, in his article in the Harvard Law Review, presents a host of historical materials to support the view that the treason clause was intended to be a broad limitation on governmental power in the area of speech. He states: "Indeed, it would be hard to believe that Madison, the author of the First Amendment and of the Report on the Virginia Resolutions in opposition to the Sedition Act of 1798, would have agreed that the expression of ideas might be criminally punished, if only the label were shifted from 'treason' ('compassing the death of the King') to some other tag." *Id.*, p. 431. The author states that "historical evidence . . . strongly suggests that the treason clause was in fact understood to guarantee nonviolent political controversy against suppression under the charge of treason or any other criminal charge based on its supposed subversive character." *Id.*, p. 442. The author further stresses that in its historic context, the "overt act" as a distinct element of treason amounts, "so far as the expression of ideas or beliefs is involved," to the requirement in any prosecution of substantial proof that the act would bring about the substantive evil sought to be prevented. *Id.*, p. 444.

is urged here is, in the light of history both in England and the United States, that the standard of proof of the "overt act" under the general conspiracy law when applied in prosecutions for inciting to the forcible overthrow of the Government is more closely akin to the exacting proof of the "act" in treason prosecutions than in ordinary criminal prosecutions where problems of speech, press and assembly are not met. The policy of the criminal law—"every crime must include an act"—is generally intended to prevent oppression by officials and to lessen the opportunities for perjury, frame-up and other arbitrary reprisals by those who wield power against individuals in disfavor. Where, however, prosecutions may result in serious curtailment of freedoms protected by the First Amendment, it is not only the accused who is interested in substantial proof of the "overt act"; all of society as history shows has a stake in the result.

The courts below, faced with the question of interpreting for the first time the applicability of the "overt act" provision of the conspiracy law to Smith Act prosecutions, swept aside all contentions that the requirement of an "overt act" placed a heavy burden of proof upon the prosecution in the proceedings herein; in the view of the courts below, the function of the overt act in conspiracy prosecutions for violation of the Smith Act is almost zero.

The trial judge gave the standard instruction common in all conspiracy prosecutions (Inst. 11-H, R. 13,747, App. Item 2(e), pp. 24-5), adding that the act "may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone" (*Id.*, p. 24). The court declined to instruct the jury "that if the

evidence is as consistent with the hypothesis that the 'overt act' is merely the exercise of speech, press and assembly as with the intention to advocate and teach or accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit, then the 'overt act' cannot be said to have been proven to be in furtherance of the alleged conspiracy beyond a reasonable doubt." The trial court also refused to instruct the jury that proof of mere participation in the lawful activities of the Communist Party could not be proof of an "overt act"; that if the proof of the "overt acts" failed to show beyond a reasonable doubt more than the exercise by petitioners of lawful discussion by speech and press, then the prosecution had failed to prove that the "overt acts" were in furtherance of the conspiracy alleged in the indictment; that if all the "overt acts" relied on by the prosecution were as consistent with petitioners' theory of the case as with that of the prosecution, it would be the duty of the jury to acquit (Prop. Insts. 39, 40, 42, 43, 44, App. Item 2(e), pp. 24, 26-9).

Thus, as can be seen, all First Amendment and historical considerations were excluded in the trial court's view of the "overt act" provision in Smith Act prosecutions. In affirming the judgments of conviction, the Court of Appeals approved the rulings of the trial court on this issue. The Court of Appeals reasoned as follows: (1) The indictment may have pleaded "innocuous" acts, but the indictment stated that they were done "in pursuance of the unlawful agreement," and that was enough [Clk. R. 115); (2) Since the jury was instructed in the same language as the pleading, that was enough [Clk. R. 122-3]; (3) In any event, the jury could

have inferred that the Lenin Memorial meeting was an "overt act" [Clk. R. 122], apparently under the general theory that "if conspirators to commit a crime of violence are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained" [Clk. R. 117].

The end result reached by the courts below disregarded not only history, but the ordinary principles of criminal law and the evidence in the record as well. The decision on the sufficiency of the "overt acts" was built upon abstract propositions of law and fact, wholly unrelated to the case herein. While undoubtedly the convictions here cannot be supported unless the standards of proof required by constitutional law and history are met, petitioners propose to show in the ensuing discussion that even if the case herein be treated as "just a conspiracy case," still even the standards of the ordinary criminal law have not been satisfied.

D. In the first place, it has never been the law that the mere giving of an instruction to the jury on an issue of fact is a substitute for evidence in support of that fact. If such were the law, a prosecutor could support a judgment of conviction without evidence, simply because the jury was instructed not to return a verdict unless there was proof beyond a reasonable doubt. ". . . a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred." *Parks v. Ross*, 11 How. (U. S.) 361, 372. There is a plethora of citations to support this rule. In *United States v. Ault*, 263 Fed,

800 (D. C. Wash., 1920), where an indictment charging conspiracy to violate provisions of the Espionage Act of 1918 was dismissed because of the insufficiency of the overt acts pleaded, Judge Neterer stated: "A court or a jury has no more right to draw inferences from facts that do not necessarily and legitimately authorize such inference than to find any other fact without evidence" (p. 804). The same court also stated: "There is no question, I think, if, after all of the evidence is presented, there is no testimony showing an overt act charged to have tended to effect the object of the conspiracy, the duty to direct a verdict of not guilty would be plain" (p. 803).

The two alleged "overt acts" were only peaceable assemblies; there was not a scintilla of evidence to establish that these meetings were to "obtain confederates." It has never been the law that any "act" of an alleged conspirator is an "overt act" in furtherance of a conspiracy. If such were the rule, it would be difficult for an alleged conspirator to draw a breath.

Less than a decade ago, this Court admonished that "the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U. S. 440, 449. The precise nature of the crime of conspiracy has remained extremely vague to a large degree because of its peculiar origins and elastic development. Arising out of an early attempt to punish those who instituted malicious prosecutions, this "mental crime" was broadened to punish all combinations to commit any offense or, indeed, any act which the common law judges deemed unlawful. Under the vague doctrine of criminal con-

spiracy the political, economic and social bias and unconscious prejudices of judges could easily be translated into one-sided decisions in fields of law where the "hydraulic pressures" of the day were adamant. The doctrine of criminal conspiracy as thus developed was subjected to serious abuse both in England and in this country where the doctrine became a part of early American law.[92]

In 1867, however, the federal conspiracy statute (Act, March 2, 1867, 39 Cong., 2d Sess., Ch. 169, 14 Stat. 484, Section 30) departed from the common law principles in two important respects: it limited conspiracy prosecutions only to those conspiracies whose object was a federal criminal offense, and it required the commission of some overt act other than the mere act of conspiring. The 1867 Act became Section 5440 of the Revised Statutes. Its clause requiring an overt act has received no substantial change since its first adoption. See, *United States v. Gradwell,* 243 U. S. 476, 481; *Gebardi v. United States,* 287 U. S. 112, 120, notes 3, 4.[93]

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[92]The English and American law and history are discussed in Bryan, J. W., *The Development of the English Law of Conspiracy* in 27 Johns Hopkins University Studies in Historical and Political Science (1909); Winfield, P. H., *The History of Conspiracy and Abuse of Legal Procedure* (Camb. 1921); Sayre, F. B., *Criminal Conspiracy* in 35 Harv. L. Rev. 393 (1922); Harno, A. J., *Intent in Criminal Conspiracy* in 89 U. of Pa. L. Rev. 624 (1941).

[93]The section as a whole, embodying the conspiracy clause, was accepted without explanation or debate. 39 Cong., 2d Sess., Sen. Feb. 28, 1867, 37 Cong. Globe 1920. Some states, like New York, had previously made changes in the common law rules. The revisers of the New York law stated: "By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offence of conspiracy is made to consist in the intent; in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of that interchange or

This Court has, of course, held that an "innocent act" may be proven to be an act to effect the object of the conspiracy, and it has not adopted the proximate relation tests of criminal attempts to "overt acts" in conpiracy prosecutions; but it has never held that an innocent act, without other evidence, can be converted into an "overt act" or that the "overt act" need have no tendency as shown by the evidence to further the conspiracy or to effect its objects. Such latter principles would simply eliminate the "overt act" requirement of the statute.

In the early decisions of this Court interpreting the law, it was decided that the gist of the offense is conspiracy; that the object of the offense must be a federal crime, for the federal courts have no common law jurisdiction, and that the purpose of the requirement of "overt acts" was to afford a *locus poenitentiae* for the conspirators. *United States v. Britton*, 108 U. S. 199; *Pettibone v. United States*, 148 U. S. 197; *Bannon v. United States*, 156 U. S. 464. Referring to the "overt acts" requirement, this Court stated: "If such were not the law indictments for conspiracy would stand upon a different footing from any others, as it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps toward carrying it out." *Bannon v.*

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agreement. . . . . ' Acts and deeds are the subject of human laws; not thoughts and intents, unless accompanied by acts." *Lambert v. People*, 9 Cowen 578, 625 (1827). There is an echo of the New York revisers in one of the early cases under the federal statute: "Acts and deeds are the subject of human laws, not mere thoughts and intents unless accompanied by acts. . . . ." *United States v. Goldberg*, 25 Fed. Cas. 1342, 1345 (No. 15,223) (C. C. E. D. Wisc., 1876). New York interprets its law as meaning that the overt act must be in furtherance of the conspiracy. "It is not sufficient if the overt act is only a part of and to form or cement the agreement." 18 Brooklyn L. Rev. 263 (1952).

United States, supra, p. 469. In *Hyde v. United States,* 225 U. S. 347, this Court emphasized the infirmities of the common law concept of conspiracy, calling it a "rigid abstraction" (p. 359). It was stated: "Such act [the overt act] is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy . . ." (p. 359). While holding that the "act" may be seemingly innocent, this Court stated "that the act must have the conspiracy in view and have some power to effect it" (p. 360). "As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. *The guilty purpose must be put into a guilty act*" (p. 363, emphasis supplied). In *Joplin Mercantile Co. v. United States,* 236 U. S. 531, this Court reverted to the rule in *Britton* and held that the "overt acts" were something apart from the conspiracy, that conspiracy was the gist of the crime, but at the same time held that proof of the overt act was "essential to the completion of the crime" (p. 536). Finally, in *Braverman v. United States,* 317 U. S. 49, this Court stated that "it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable . . ., or as something apart from it, either as an indispensable mode of corroborating the existence of the conspiracy or a device for affording a locus poenitentiae" (p. 53). The salient principle is that without proof of the overt act, "a charge of conspiracy cannot be submitted to the jury" (p. 53).

Thus, even in the terms of ordinary criminal law, this Court has assigned an important function to the "overt act" in conspiracy prosecutions. The act must show the

"existence of the conspiracy"; it must show that the conspiracy is in "execution"; it must show that the general and specific criminal intents have erupted into an "open deed" from which there is no retreat and which for the first time calls for the application of the sanctions of the law; there must be "some power" in the act to effect the object of the conspiracy. The very statute calls for an "act to effect the object of the conspiracy (18 U. S. C., Section 371), which, taken literally, means to "complete, realize, carry out, consummate, compass, fulfill" (Webster's *New International Dictionary*), the object of the conspiracy. If this Court has never carried the construction of the law to those limits, it certainly has never held that the "overt act" is equivalent to any "act" which a jury may guess or conjecture is in "furtherance of the conspiracy."

Nor have the lower courts adopted a different interpretation. Thus, in *United States v. Ault*, 263 Fed. 800 (D. D. Wash., 1920), nineteen "overt acts" alleged in the indictment, consisting of vitriolic attacks upon governmental policies and officials, were held insufficient in relation to a conspiracy allegedly having as its object attacks upon "the form of the government or the Constitution of the United States." The court stated that such acts would "not be a step or link in the chain which would effect, achieve, or accomplish the criminal conclusion of the charge, and could not be considered as overt acts" (p. 803). In *Lonabaugh v. United States*, 179 Fed. 476 (C. A. 8, 1910), the court stated that it is not enough that the act is "directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction" (p. 481). In *DeLuca v. United States*, 299

Fed. 741, 745 (C. A. 2, 1924), the court stated: "However, the overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. It is the character of the act which is the determining factor and classifies it. It is not the name which it may be called." In *United States v. McLaughlin*, 169 Fed. 302, 307 (D. C. Minn., 1908), the opinion read: "It [the overt act] may not be sufficient of itself to complete the offense, but it should have a tendency to do so." In *Tillinghast v. Richards*, 225 Fed. 226 (D. C. R. I., 1915), where the question was exhaustively discussed, the court stated: "While it is possible that what are alleged as overt acts might be such as to a conspiracy of a different character, they are not in train or in causal connection with the unlawful object of the conspiracy here alleged. . . . These are, for all that appears, nonculpable acts, from which no intent to defraud can be inferred. . . ." (pp. 229, 230). In *Dahly v. United States*, 50 F. 2d 37, 42 (C. A. 8, 1931), the court stated: "The overt act or acts need not be criminal *per se*; but an overt act must be one independent of the conspiracy or agreement . . . it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy." In *United States v. Offutt*, 127 F. 2d 336, 340 (C. A. D. C., 1942), Judge Vinson stated: "Of course it is well settled that an overt act need not be a wrong. It is rather a manifestation that the conspiracy is at work. *But it must be that*" (emphasis supplied).

E. Tested by the aforesaid principles of ordinary criminal law, there was no evidence in the record which justified the submission to the jury of the two "overt

acts" upon which the prosecution relied below. There was simply no relation between the alleged conspiracy of these petitioners to advocate and teach the forcible overthrow of the Government and to use the Communist Party as a vehicle for such purpose and the two public and peaceable meetings sponsored by the Communist Party in Los Angeles. On their face, the meetings were so innocuous and so lawful that no serious contention can be made that they gave any indication that the conspiracy charged in the indictment was in execution or that the "acts" could by any possibility effect the objects of the alleged conspiracy. No possible inference of a conspiracy, of an intent to advocate and teach the forcible overthrow of the Government or an intent to accomplish such overthrow as speedily as circumstances permit, could be drawn from these two meetings. The short of the matter is that there was just no evidence to show that these two "overt acts" were "in furtherance" of the alleged conspiracy or to "effect the objects" thereof.

While it may appear unnecessary, therefore, to discuss the theory upon which the case was submitted to the jury, since without evidence the jury could not be justified in returning its verdict, it is important to discuss the matter because of its relation to the constitutional question here presented.

The theory of the prosecution, adopted by the courts below, in effect was this: An accused in a Smith Act conspiracy prosecution, when shown to have performed any act on behalf of the Communist Party, or to have participated in any of its activities, no matter how lawful, has committed an "overt act" in furtherance of a conspiracy to advocate and teach the forcible overthrow of

the Government and to use the Party for such purpose with the specific intent to accomplish that forcible overthrow as speedily as circumstances permit. The gloss placed on this theory below was the generality that the "jury is justified in drawing legitimate inferences from all the evidence."[94]

Not only does such theory lack legal validity; it represents the dangerous technique of permitting the jury to decide a Smith Act prosecution by conjecture, surmisal, suspicion and guesswork. Instead of limiting such prosecutions to proof of guilt beyond a reasonable doubt, it permits the jury, if such argument be accepted, to vote its prejudices. The major premise of this theory is that the entire Communist Party is a conspiracy, that any "act" in support of that Party or any participation in its activities is an "overt act" in furtherance of the "conspiracy." Attendance at public meetings sponsored by that Party, signing the most laudable petition initiated by that organization, joining the Party, paying dues—any connection—direct, indirect, or parallel—would be interdicted. Such "overt acts" might indeed serve to prove, by "reasonable inference," that the most innocent actor had become a member of an alleged conspiracy. Yet, the court

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[94]We do not repeat our prior discussion on the insufficiency of the evidence generally. There is no rule that permits inferences to be drawn where there is no evidence, direct or circumstantial, from which the inference can be drawn; nor do we again discuss the invalidity of piling inference upon inference from a baseless premise (*supra*, pp. 145-158). Professor Wigmore states:

> "But, in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary." *Evidence* (3rd ed.), II, p. 106.

below conceded that the Communist Party was not the conspiracy charged in the indictment; the evidence was clear that the Party engages in lawful activities; and in theory of law this has never been denied. *Wieman v. Updegraff*, 344 U. S. 183. Apparently, it was the view below that the law was satisfied by these legal concessions, even if the jury were permitted to conjecture to the contrary.

Nor did the minor premises of the prosecution and the courts below have any added validity. It appeared to be the view below that no inference of wrongdoing could be drawn from mere membership in the Communist Party, but that the jury could legitimately draw such inferences from Party membership plus any other activity in connection with the Party, no matter how lawful. The line was drawn between passivity and movement. Such a line was not drawn by the Congress when it enacted 50 U. S. C., Section 783(f), (Act Sept. 23, 1950, c. 1024, Title I, Sec. 4, 64 Stat. 991). It is there provided that "neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation . . . of any other criminal statute." Certainly, if membership or officership in the Party is not *per se* a violation of any criminal statute, proof of lawful acts as a member or officer of the Party does not total up to a violation of any statute, or justify such inference.

Another minor premise advanced below ran somewhat as follows: Admitting that the assembly was lawful and peaceable, still one of the accused had spoken critically of governmental policies. The jury, despite the absence of any other evidence, could "infer" that this utterance

was an "overt act" in furtherance of the conspiracy because it was probably intended to create doubts in the minds of the listeners about the trustworthiness of governmental officials; that these doubts would probably be resolved by the conviction of the hearers that the form of government should be abolished; that this conviction in turn would probably lead to the conclusion that the present Government of the United States should be overthrown by force and violence, and as speedily as circumstances permit.

As we have noted, there was not a scintilla of other evidence in the record to justify any initial inference of conspiracy or criminal intent from the utterance, let alone the grotesque series of inferences which were strung together by the prosecution thereafter.[95]

Finally, it was conjectured below that the meetings which some of the petitioners attended were intended to help "organize the Party," or "strengthen" it, or "recruit confederates." Of course, there was no evidence of any recruiting or solicitation of any kind at the meetings, or any evidence that it was intended for such purpose. It was "reasoned," however, that some persons might like the Party after listening to the speeches; that they would apply for membership; that thereafter they would receive books on Marxism; that they would read these books and interpret them as the prosecutor did; that thereafter they would become convinced that the Government should be overthrown by force and violence; then seek out the "conspiracy," and join.

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[95] "An inference of criminality must rest on something more substantial than the imagination of a prosecuting attorney or a trier of the facts." *United States v. Gardner*, 171 F. 2d. 753, 756 (C. A. 7, 1948).

It should be noted that petitioners were not indicted for conspiring to organize or to strengthen the Communist Party, nor for conspiring to recruit members to that Party. The sole charge here was that these petitioners conspired to use the Party as a vehicle "to advocate and teach the overthrow of the Government of the United States by force and violence" [Inst. 13, R. 13,756, App. Item 2(g), p. 36]. The lawful assemblies involved herein gave no inkling that such a conspiracy was afoot and they could not logically have any tendency to effect the object of such alleged conspiracy. The guesswork in which the courts below permitted the jury to indulge was so patently wrongful, that the mere statement of these catenate inferences is enough to show the error committed.[96]

It will thus be seen, that only by disregarding the evidence and torturing the rules of logic to their extremity, can any argument be made that participation in the lawful assembly sponsored by the Communist Party in this record here was an "overt act" in furtherance of the conspiracy alleged in this indictment and to effect the objects thereof. No decision of any court in any criminal case, when the language of the decision is read with the recital of the facts therein, supports the ruling of the courts below. What in effect was done here was to disregard the plain requirements of the federal statute and to return to the doctrines of common law conspiracy.

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[96] ". . . to argue that, because a man is a Catholic, he must think it right to murder an heretical sovereign, and that, because he thinks it right, he will attempt it, and then to found on this conclusion a law for punishing him as if he had done it, is plain persecution." Macauley, *Critical and Miscellaneous Essays* (N. Y. 1879), vol. I, p. 195.

The broad consequences of such action is the burden of our final discussion on this question.[97]

F. (1). Judge Learned Hand once spoke of the conspiracy prosecution as "that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F. 2d 259, 263 (C. A. 2, 1925). He warned later against the practice of prosecutors who "seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." *United States v. Falcone*, 109 F. 2d 579, 581 (C. A. 2, 1940).

It has long been recognized that loose practice in the use of the conspiracy weapon constitutes "a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U. S. 440, 446, n. 2. The crime is "predominantly mental in composition" (*Id.*, p. 448), an offense which has become so "elastic" in modern times and so dangerously extended in its concept and facilitation of proof (*Id.*, pp. 451-2) as to justify the concern of the entire legal profession and judiciary.[98] Particularly are there procedural advantages from using the conspiracy device which add to the danger of "unguarded extension

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[97]Wharton states:

"The only safe course is to make the test objective, even, and palpable, and to apply universally the limit here presented, holding that conspiracy does not lie unless the defendant can be proved to have done something which, if not interrupted by extraordinary occurrences, or by collateral human intervention, would have resulted in an unlawful act." *Criminal Law* (12th ed.), vol. II, Sec. 1605, p. 1864.

[98]See, Lasky, *The Long Bow or Lucretius, Book IV, Line 817*, in 43 Calif. L. Rev. 596 (1955), where the loose use of conspiracy prosecutions against economic organizations is subjected to critical examination.

of the concept" (*Id.*, pp. 452-53). "The hazard from loose application of rules of evidence is aggravated where the Government institutes mass trials" (*Id.*, pp. 453-4).

Our point here simply is that the incidence of a ruling by this Court on the kind of proof necessary to establish the "overt act" in prosecutions under 18 U. S. C., Section 371 will necessarily extend far beyond Smith Act prosecutions. There is no mystery about a conspiracy prosecution. Like all offenses, every ingredient of the crime should be proved by clear, convincing and unequivocal evidence. To undermine the "overt act" provision of the statute, to evolve a rule that "any act" is an "overt act," would not only be contrary to law, but it would increase in multifold fashion the dangers of oppression from prosecutors and the triers of the facts alike. If it is the policy of the law not to punish the mere *mens rea*, if it is the policy to punish only the "open deed," that policy would seem thwarted by a rule which makes it unnecessary to prove by substantial evidence that the "deed" was in furtherance of the conspiracy and to effect the object thereof.

(2) However, Smith Act prosecutions are something more than ordinary criminal prosecutions. This Court has noted that each of such prosecutions involves issues of speech, press and assembly. *Dennis v. United States*, 341 U. S. 494, 502.[99] It is, therefore, important that the general conspiracy law shall not be given a construction, as applied to Smith Act prosecutions, which will entrench on basic liberties.

At least before such a fundamental right as freedom of assembly is given the "dynamic quality of crime,"

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[99]See, Boudin, *"Seditious Doctrines"* and the *"Clear and Present Danger Rule"* in 38 Va. L. Rev. 143, 315 (1952).

there should be the clearest proof that a particular assembly, lawful in all respects, is an "overt act" in furtherance of a conspiracy. If this standard is not maintained, there is the evident danger that all may incur punishment who attend such a peaceable assembly, all may become "conspirators" or "abettors" or "accessories." The right of association will thus disappear, and the doctrine of guilt by association will become not only the weapon of the politician, but the law of the judicial forum. Against such inroad, the courts, it is respectfully submitted, should "set their faces like flints" *Bridges v. United States*, 184 F. 2d 881, 887 (C.A. 9, 1950). See also, O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592 (1948); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276 (1948).

Of course, a combination of persons assembled together may by "open acts" indicate that their purpose is to further a conspiracy to commit serious crimes. But it is quite another thing when the law denotes a peaceable assembly, and every utterance therein, as an "overt act" in corroboration of some conspiracy merely because an alleged conspirator attended or spoke at the meeting in lawful and peaceable manner. Even in 18th Century England, unfettered by a written Constitution, no such rule was ever invoked. Stephen in his *History of the Criminal Law of England* notes that the application of the inchoate crime of conspiracy "to political and especially to seditious offences is comparatively modern" (1883), Vol. II, p. 377. He states: "Seditious language, however, has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, *of which violent speeches have*

been regarded as overt acts" (*Id.*, p. 377), (emphasis supplied). Stephen adds: ". . . but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is *such as to produce a breach of the peace*, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence . . ." (*Id.*, p. 386), (emphasis supplied). Thus, in England, where only common law conspiracy was involved, the necessity of allegation and proof of some guilty "act" was a requirement to evidence the guilty intent.

We respectfully submit that the law in the United States, in the face of the express language of a Congressional statute and the mandate of the Constitution, should require no less an exacting standard in the proof of the "overt deed." This Court once stated: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U. S. 542, 552. See also, *Hague v. C. I. O.*, 307 U. S. 496. That right, and all other rights cognate thereto, may well be lost if a peaceable assembly, without substantial proof, can be turned into an "overt act" in furtherance of an alleged conspiracy.

(3) Finally, and most importantly, without a standard of clear, convincing and unequivocal proof, insofar as the "overt act" in conspiracy prosecutions is concerned, the fundamental right to freedom of expression and discussion may well be lost. There are many courageous persons who can withstand the epithets flung at them in the marketplace of ideas; there are few who can stand

up to a threat of imprisonment. Yet without freedom of expression, without freedom to assemble and criticize, the most vital policies of government, affecting the life and death of its citizens, may go unchallenged. Writing of the attacks upon civil liberties during the first World War, a learned observer states: "Those who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great tradition of our race. Not satisfied to have justice and almost all the people with our cause, we insisted on an artificial unanimity of opinion behind the war. Keen intellectual grasp of the President's aims by the nation at large was very difficult when the opponents of his idealism ranged unchecked while the men who urged greater idealism went to prison. In our efforts to silence those who advocated peace without victory we prevented at the very start that vigorous threshing out of fundamentals which might today have saved us from a victory without peace." (Chafee, *Freedom of Speech* (1920), p. 119). Unless this Court draws the line sharply between "acts" of speech, press and assembly, and "acts" of conspiracy, incitement and attempts, the balance betwen order and security on the one hand, and guaranteed personal liberties on the other, will not be maintained. Without such balance, as this Court has often stated, the nation cannot endure.

Justice Jackson stated in *Thomas v. Collins*, 323 U. S. 516, 547: "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such . . . . Speech of political malcontents is sought to be reached by associating it with some variety of 'sedition.' Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or

does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one." In *American Communications Association v. Douds*, 339 U. S. 382, 393, 399, Chief Justice Vinson stated: "Communists, we may assume, carry on legitimate political activities . . . The high place in which the right to speak, think, and asemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas."

On at least three different occasions this Court has rendered landmark decisions affecting the Communist Party and its members which emphasizes the aforesaid. We refer to *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; and *Schneiderman v. United States*, 320 U. S. 118.[100] In all of these cases, this Court made it clear that no criminality could be attached, nor dubious inferences drawn, from lawful speech, press or assembly, whether such speech, press or assembly emanated from the Communist Party and its members, or from any other group against whom official hostility was directed. Moreover, in each case this Court insisted that the fundamental reason for so holding was to preserve inviolate constitutional liberties against subtle encroachments.

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[100]The same rationale permeates such decisions as *Fiske v. Kansas*, 274 U. S. 380; *Hartzel v. United States*, 322 U. S. 680; *Taylor v. Mississippi*, 319 U. S. 583.

In each of these cases, the evidence of the "overt deeds" was far more replete than the two almost silent assemblies involved herein. See, *DeJonge v. Oregon, supra,* at pp. 358-60; *Herndon v. Lowry, supra,* at pp. 247-253; *Schneiderman v. United States,* 320 U. S. 118, at pp. 125-31. Yet, in each case, this Court refused, in the light of the Constitution, to attribute criminality to or infer criminality from the activities of the accused.

In *Herndon,* this Court stated:

> "We are of opinion that the requisite proof is lacking . . . The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fail to establish an attempt to incite others to insurrection . . . The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have forseen his words would have some effect on the future conduct of others" (pp. 259-61, 263-4).

This Court in *Herndon,* therefore, refused to draw unlawful inferences from the exercise of constitutionally protected freedoms, and declined to permit the jury to pile inference upon inference from such lawful activities to some baseless and biased conclusion.[101]

In the courts below, all of the aforesaid was dismissed with "this is a conspiracy case." But this Court has never accepted the "form" as a substitute for the "sub-

[101]The standard of proof in both criminal and civil proceedings, where liberties are at stake, has never lessened. *Baumgartner v. United States,* 322 U. S. 665; *Klapprott v. United States,* 335 U. S. 601; *Gonzales v. United States,* No. 111, October Term 1955, decided December 12, 1955; 24 L. W. 3164.

stance." In the respect herein, the "overt act" must be proved substantially whether the form of the charge is a substantive offense or a conspiracy to commit the offense. It was not the form of the proceeding which bottomed the decisions in *DeJonge, Herndon* and *Schneiderman* (they were both civil and criminal)—it was the fact that constitutional rights would be lost if, without substantial evidence to justify a contrary conclusion, the State or the trier of the facts could infer criminality or criminal intent from the lawful exercise of speech, press and assembly. Indeed, it would appear to be a more serious violation of right, when the State disregards an express Congressional mandate and asserts that a federal court may take jurisdiction of a conspiracy prosecution without alleging and proving a single overt act corroborating the existence of the alleged conspiracy, except a lawful and peaceable assembly. "The most odious of all oppressions are those which mask as justice." *Krulewitch v. United States,* 336 U. S. 440, 458.

Whatever may be the nature of the inchoate crime which the law seeks to punish—incitement, attempt or conspiracy—it is submitted that the constitutional mandate cannot be satisfied without "clear, unequivocal and convincing proof" of the "overt deed." It may be that one offense may be morally more repellant than another, but in any case no subjective aversion to one crime as against another can justify the abandonment of legal requirements of proof without which constitutional rights may be infringed, indeed washed away.

> ". . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"
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> *Boyd v. United States,* 116 U. S. 616, 635.

III.

The Exclusion of the Issue of Incitement to Action From the Case by the Courts Below Resulted in an Unconstitutional Construction and Application of the Smith Act.

The courts below construed the Smith Act as punishing all advocacy and teaching of the forcible overthrow of the Government when accompanied with a criminal intent. With respect to the idea of overthrow of the Government "by force and violence," the courts below appeared to draw no line between discussion, advocacy of general principles or incitement to action.[102] In the posture of the record below, it was held that any agreement by members of the Communist Party to advocate and teach the doctrines of Marxism-Leninism, equated with "force and violence," was interdicted by the Smith Act and conspiracy law.[103] It was unnecessary under the Smith Act, according to the courts below, for the contemplated teaching and advocacy to include any call to action. The issue of "incitement to action" was specific-

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[102]The editors of United States Law Week construe the opinion of the Court of Appeals as follows:

> "Smith Act indictment charging that defendants have conspired, with specific objective of causing forcible overthrow of Government, to organize group dedicated to advocacy and teaching of such overthrow adequately defines criminal conspiracy *even if planned advocacy and teachings are protected by First Amendment.*" 23 L. W. 2477 (March 29, 1955) (Emphasis supplied.)

[103]The courts below ruled that intent to overthrow the Government by force and violence "as speedily as circumstances permit" could be inferred from proof of such agreement. The "overt act" to effectuate such consipracy could be inferred from any participation in the activities of the Party, no matter how lawful. The agreement to so advocate and teach with intent to overthrow was the "clear danger"; the intent to overthrow as speedily as circumstances permit, the "present danger."

ally excluded from the case and from consideration by the jury at the trial.

The question presented is whether such construction and application of the Smith Act to these petitioners is in accordance with this Court's interpretation of the statute in *Dennis v. United States,* 341 U. S. 494, and the applicable provisions of the Constitution examined in the light of the legal and political history of the nation. The discussion which follows may be appropriately divided as follows: the treatment of the issue of "incitement to action" by the courts below in the case herein; the consideration of the same issue by the different courts in the *Dennis* case; the legal and historical roots of First Amendment rights to full and free discussion and advocacy, as contrasted with utterances which incite to unlawful actions; the instructions by the trial court to the jury herein after the exclusion by that court of the issue of "incitement to action"; the invalidity of the construction of the statute by the courts below in the light of constitutional law and history.

A. The Treatment of the Issue of "Incitement to Action" by the Courts Below.

(1) There is no room in the record for any dispute as to the plain purpose of the trial court to exclude the issue of incitement from the case. "That may have been important in the Dennis case," stated the District Court, "but I think that question is laid at rest by the Dennis case" [R. 9693]. When the question was raised again on the motions for judgments of acquittal, the District Court stated that Congress had "constitutionally proscribed" advocacy of violent overthrow of the Govern-

ment when it was accompanied by the requisite intent. "Whether it is of the degree that amounts to incitement, whether it is something else, might be one way of characterizing the evidence, but I don't think it would help here" [R. 9693].

Thus, it was immaterial to the trial court whether the proof failed to show any agreement to advocate in language of incitement to action. Petitioners requested the trial court to instruct the jury that a finding that petitioners had agreed to advocate in terms of a call or incitement to action was essential to a verdict of guilt.[104]

The United States at the same time requested the trial court to instruct the jury to the same effect in the precise language of the instruction given on this subject in *Dennis* (341 U. S. at 511-12).[105]

None of the aforesaid instructions was given. Thus, the failure to instruct did not rest upon the particular formulation in the proposed instructions. On the contrary, both the respondent and the petitioners were unsuccessful in any way in persuading the trial court to submit the issue of "incitement to action" to the jury; no formulation was acceptable to the trial judge because he

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[104] ". . . a person can be said to teach or advocate the overthrow and destruction of the Government of the United States by force and violence only when his expressions are designed to induce action, rather than discussion or belief, and only when they are expressed in language which, under the circumstances in which it is used, is reasonably and ordinarily calculated to incite persons to such action, rather than merely to discussion or belief"; that the burden was on the prosecution to establish that the common understanding of the alleged co-conspirators included an understanding that "advocacy would be in language amounting to incitement to action" (Prop. Inst. 29, 51, App. Item 2(q), pp. 74, 76).

[105] (See p. 112, n. 69, *infra*).

did not believe that the issue of incitement was a question of fact for the jury to decide.[106]

The trial court made its position plain. The court could not see in the record what the language of "incitement to action" was; such language "would mean anything at all" to the court; and the court didn't know "what it would mean to the jury." The crime was committed if the accused agreed to advocate and teach with the "proscribed intent," whether language of incitement was contemplated "or not."

(2) The Court of Appeals, while following a different road, reached the same result as that of the trial judge. The Court held that the trial judge had quite properly refused to give any instructions on the issue of "incitement to action"; it ruled that in *Dennis* such an instruction might have been essential but that here it was not because the amendment to the conspiracy provisions of the law adding the requirement of proof of an overt act had changed the character of a prosecution such as this

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[106] "The Court. *What is the language that is incitement to action? That means anything at all to me. I don't know what it would mean to the jury*" [R. 12,441]. (Emphasis supplied.)

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"The Court. I think there again you are talking about the quantum of proof, the type and character of evidence. As I understand it, and as I have said, a man can get out here on the front steps of the Federal Building and in the best of well modulated tones, almost timid, could make this speech to be reproduced on a recorder and played to the jury and the jury might find he advocated the overthrow of the government by force and violence, and he advocated it in certain language and in a certain tone of voice which you and I might consider mild, very mild. The jury might decide he did it with the intent to accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances permit" [R. 12,442-3].

from something other than a "true" conspiracy case to a "standard" conspiracy case.[107]

Thus, the Court of Appeals gave express approval to the rulings of the trial court. It held that the issue of "incitement to action" had been properly excluded from the jury's consideration [Clk. R. 129].

B. The Treatment of the Question of "Incitement to Action" in Dennis.

If, as the Court of Appeals held, there is a "deep gulf" between the *Dennis* case and the case herein, it lies precisely, in at least one respect, between the construction and application of the Smith Act by the respective courts on the question of incitement to action. Here the courts below drew no distinguishable line between discussion, advocacy and incitement; the courts in *Dennis, without exception,* fixed the line sharply, emphasizing that such construction was demanded by the Constitution.

Thus, Judge Medina in *Dennis* instructed the jury, first, that it must be satisfied beyond a reasonable doubt that the accused conspired to advocate and teach the forcible overthrow of the Government and to organize the Communist Party for such purpose. 9 F. R. D. 367, 376. Judge Medina then instructed the jury that they must also be satisfied beyond a reasonable doubt that each of the accused intended to forcibly overthrow the Government "as speedily as circumstances would permit

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[107]The Court of Appeals stated: "Under this indictment, *if it be assumed that advocacy and teaching are immunized by the constitutional guarantees,* still, *even though these means were lawful and protected,* since the advocacy was intended to cause the destruction and overthrow of the government by force, a criminal conspiracy was defined" [Clk. R. 114]. (Emphasis supplied.)

it to be achieved" 9 F. R. D. 367, 390. The Court then stated:

> *"In further construction and interpretation of the statute* I charge you that *it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action.* Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence, and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, *with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all* with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."[108] (9 F. R. D. 367, 391). (emphasis supplied.)

How critical the issue of "incitement to action" was to a disposition of the case in *Dennis* can be gauged by

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[108]This instruction was patterned after the instruction of the trial judge, approved by this Court, in *Gitlow v. New York*, 268 U. S. 652. The instructions of the District Court in the case herein contain no reference to the right to advocate or teach the abstract doctrine of forcible overthrow of Government. Neither the words "action" nor "incitement" appear anywhere in the instructions. All proposed instructions on these issues in varying language were rejected.

an examination of the majority opinion written by Judge Learned Hand and the concurring opinion of Judge Chase. In summary, Judge Hand held that the Act was constitutional "as the [trial] judge construed it." 183 F. 2d 201, 207. Judge Hand adopted the following criteria: (1) The case involved the area of political expression—political "utterances" and "agitation"; (2) utterances which call for unlawful action, which directly instigate to crime are not constitutionally protected; (3) utterances which are only designed to convince, which only affect the hearer's beliefs are protected by the First Amendment; (4) utterances which combine both peaceful persuasion and instigation to crime may or may not be punishable, dependent upon the application of the "clear and probable danger" rule. Thus, under the criteria adopted by Judge Hand the "nature of the words used" was bound to include incitement to action if the Smith Act were to be properly construed and applied under the Constitution. 183 F. 2d 201, 207, 212.

The gist of Judge Chase's concurrence may be summarized as follows: (1) the trial judge properly construed the statute as punishing only advocacy in language of incitement to action; (2) the statute, and the evidence, does not deal with both expressions of belief and calls to action; (3) utterances which only incite to action are not protected by the First Amendment; (4) if Congress reasonably finds that an utterance which incites to action presents a danger to the Government, it may proscribe such utterance; (5) under such circumstances, judicial

restraint requires upholding of the law and affirmance of the conviction, if the evidence be sufficient to prove the utterance was in language of incitement to action. 183 F. 2d 201, 235, 236.

Not a single Justice of this Court in *Dennis* differed with the construction of the statute by the lower courts insofar as the question of incitement to action was concerned. Thus the majority opinion of Chief Justice Vinson (Justices Reed, Burton and Minton concurring), after noting that the statute "requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence" 341 U. S. 494, 499-500, continues with the later statement in the opinion that even so, such advocacy coupled with such proscribed intent "contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech." 341 U. S. 494, 502. "This is a federal statute which we must interpret as well as judge" (*Id.*, p. 502). Then, after reviewing the decisions, the Chief Justice states that "there remains the problem of whether the trial judge's treatment of the issue was correct" (*Id.*, p. 511). This is immediately followed by quotations from Judge Medina's instructions on incitement (first paragraph) and "clear and present danger" (second and third paragraphs) (*Id.*, pp. 511-12). On the issue of incitement, the Chief Justice states as follows:

> "*The first paragraph of the quoted instructions* calls for the jury to find the facts *essential* to establish

> the substantive crime, violation of Sections 2(a)(1) and 2(a)(3) of the Smith Act, involved in the conspiracy charge."[109] (341 U. S. 494, 512-13; emphasis supplied.)

It is true that at one point in his opinion Chief Justice Vinson appears to draw a line between advocacy and discussion. "It is directed at advocacy, not discussion" (341 U. S. at 502). However, it is clear that the Chief Justice was speaking there of advocacy of action, not advocacy of ideas. For in the very next sentence he noted that the jury had been properly instructed that there could be no conviction for "advocacy in the realm of ideas." That the distinction drawn between advocacy and discussion relates to the difference between a call to action and support of an idea is further emphasized, not only by the approval placed upon the trial judge's instruction to this effect, but also by the opinion's definition of the problem with which it was dealing: "If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required" (*Id.*, p. 509). After thus setting forth his construction of the facts as showing a conspiracy prepar-

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[109]The conspiracy statute (18 U. S. C., Sec. 371) punishes only those persons who conspire to commit an "offense against the United States." Unless the object of the conspiracy is a federal offense, there can be no conviction for conspiracy under 18 U. S. C., Section 371. There are no common-law offenses against the United States. *United States v. Hudson*, 7 Cranch 32; *Krulewitch v. United States*, 336 U. S. 440, 457. According to the opinion of Chief Justice Vinson, the construction of the statute by Judge Medina to include language of incitement to action was "essential" to establish the substantive offense, the object of the alleged conspiracy.

ing for action, the Chief Justice goes on to note that it contemplates a "call" to such action. "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to *call* when the leaders, these petitioners, felt the time had come for *action* . . . convince us that their convictions were justified on this score" (*Id.*, pp. 510-11) (emphasis supplied). In addition, the opinion's emphasis upon the necessity of clear proof of the defendants' "power to bring about the evil" of an attempt at violent revolution sheds further light on the character of the "advocacy" condemned. The power to bring about the evil would be of no moment in a conspiracy which did not contemplate at least a call to action designed to bring about the evil.[110]

Justice Frankfurter, in his concurring opinion, notes the significance of Judge Medina's instructions on incitement. Justice Frankfurter states:

> "On the basis of the instructions, the jury found, for the purpose of our review, that the advocacy which the defendant inspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit. This brings us to the ultimate issues." (341 U. S. 494, 518.)

The opinion of Justice Frankfurter then stresses that utterances which directly instigate to unlawful action are historical exceptions to the broad freedoms protected by the First Amendment. The common law principle "that

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[110]Significantly the trial court below refused to consider the element of "power to bring about the evil" also. See discussion of clear and present danger, Point IV, pp. 259-274, *infra*.

a person who procures another to do an act is responsible for that act as though he had done it himself . . . was extended in Fox v. Washington, . . . *supra*, to words directed to the public generally which would constitute an incitement were they directed to an individual. It was adapted in Schenck v. United States, . . . into a rule of evidence designed to restrict application of the Espionage Act. It was relied on by the Court in Gitlow v. New York, . . . *supra*" (341 U. S. 494, 545). Discussing *Abrams, Schaefer* and *Pierce* which followed *Schenck*, Justice Frankfurter states: "The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement" (*Id.*, p. 536).[111]

Justice Jackson stated: "I think direct incitement by speech or writing can be made a crime . . . . Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. It is a question of fact in each case" (341 U. S. 494, 571-2). A conspiracy to advocate and teach in language of incitement to action was in the view of Justice Jackson a criminal offense like other criminal offenses, not subject to constitutional objection (*Id.*, p. 571).

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[111]"We frequently have distinguished protected forms of expression from statements which 'incite to violence and crime and threaten the overthrow of organized government by unlawful means.' Stromberg v. California, 283 US at 369, 75 L ed 1123, 51 S Ct 532, 73 ALR 1484. See also Near v. Minnesota, 283 US at 716, 75 L ed 1367, 51 S Ct 625; De Jonge v. Oregon, 299 US at 365, 81 L ed 284, 57 S Ct 255; Cantwell v. Connecticut, 310 US 296, 308, 84 L ed 1213, 1220, 60 S Ct 900, 128 ALR 1352; Taylor v. Mississippi, 319 US at 589, 87 L ed 1606, 63 S Ct 1200." Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 545.

Although the issue of incitement to action is not specifically discussed in the dissenting opinions of Justices Black and Douglas, it appears clear from those opinions that they assumed that the Constitution at the very least demanded the construction by the trial court in that respect.

Thus, every Justice in *Dennis*, from the inception of the case to its conclusion, was agreed that the Smith Act punishes only advocacy and teaching in language of incitement to action. The fundamental issue throughout was whether, even so, the Act was constitutional in the light of the protection offered to freedom of political expression by the First Amendment. The varying formulae adopted by the different members of this Court and by the Court of Appeals—"clear and present danger"; "clear and probable danger"; "legislative rule of reason"; "judicial restraint"; "conspiracy"—indicate the troublesome nature of the constitutional question even when applied to such narrowly defined utterances of "incitement to action."

Here, the courts below have indeed "kicked the beam." They have construed *Dennis* as holding that, given the specific intent, the Smith Act punishes utterances which embody the idea of forcible overthrow of the Government even without any call or instigation to action. It is submitted that *Dennis* did not so hold; that no decision of this Court has ever so decided directly or indirectly; that such views were never adopted in this country by any responsible person or authority; and, indeed, this position ceased to be accepted in England before the close of the 18th century.

C. The Legal and Historical Roots of First Amendment Rights to Full and Free Discussion and Advocacy Contrasted With Utterances Which Incite to Unlawful Action.

Professor Chafee observes that the framers of the Constitution and the Bill of Rights "did not invent the conception of freedom of speech as a result of their own experiences of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. It was the product of a people of whom the framers were merely the mouthpiece. Its significance was not fixed by their personality, but was the endless expression of a civilization." *Freedom of Speech* (1920), p. 31. Thus, the nature and extent of freedom of political expression under the Constitution requires not only an examination of judicial precedents, but an examination of the history which bears significantly on the issue here involved.

Long before the founding of the nation, Montesquieu[112] stated as follows:

> "Words carried into action assume the nature of that action. Thus a man who goes into a public marketplace to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action: everything is confounded, if words are construed into a capital

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[112]The influence of the writings of Montesquieu on the founders of America, and American institutions, has been marked. Clough, *Our Long Heritage* (1955), pp. 2, 179 *et seq.* See also, *Federalist*, No. XLVII; Elliot, *Debates in the State Conventions on the Federal Constitution* (1907 ed.), 5 vols.

crime, instead of considering them only as a mark of that crime."

The Spirit of Laws (1873 ed.), Vol. I, Book XII, Ch. XII, p. 223.

The aforesaid conclusion of one of the leading thinkers in an age of rationalism and natural law synthesizes the sanguinary struggles of men in different centuries to eliminate the varying restraints placed upon the expression of ideas antagonistic to existing religious, political or economic orders. By the age of Montesquieu, "freedom of speech assumes the character of an ideal which, apart from particular restraints, is deemed of intrinsic merit to the progress of civilized life. In its first aspect it is primarily a rallying cry of minorities eager for expression. In its second it arrays itself as a philosophic truth to which history lends reality." Landis, J. M., *Freedom of Speech and of the Press* in VI Ency. of Soc. Sci. 455 (1931).

This Court has had occasion to discuss the historical background of the First Amendment. See, for example, *Near v. Minnesota,* 283 U. S. 697, 713; *Grosjean v. American Press Co.,* 297 U. S. 233, 245; *Lovell v. Griffin,* 303 U. S. 444, 451; *Dennis v. United States,* 341 U. S. 494, 521. Perhaps more important than that history is the philosophy which underlies it. Thus, without retracing the struggles against constructive treason, censorship of the press and seditious libel, it is pertinent to observe here the conclusions which the legal historians have drawn from those ancient struggles in the past. In Stephen's *History of the Criminal Law of England* (1883 ed.), Vol. II, p. 299, the author states that "two different views may be taken of the relation between rulers and their subjects." The first view regards the ruler

as the superior of the subject, and under such view "it must necessarily follow that it is wrong to censure him openly." On the other hand, if "the ruler is regarded as the agent and servant," then "this sentiment must be reversed." To those who hold this second view, "there can be no such offense as sedition. *There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal*" (emphasis supplied).

Holdsworth, quoting these views of Stephen, states: "The first of these two views was the accepted view in the seventeenth century. The second was gathering strength during the latter part of the eighteenth century, and is now the accepted view." *History of English Law* (2nd ed.), Vol. VIII, p. 338.

Of the early American scene, Professor Chafee has this to say: "The founders had seen seventy English prosecutions for libel since 1760, and fifty convictions under that common-law rule, which made conviction easy . . . The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government *without any incitement to law-breaking,* forever impossible in the United States of America." *Freedom of speech* (1920), pp. 22, 23 (emphasis supplied). It is not difficult to annotate this conclusion. See Elliot's *Debates in the State Conventions on the Federal Constitution* (2nd ed., 1907)), Vol. 2, pp. 93, 432, 435, 449, 453,

455, 469, 488, 552; Vol. 3, pp. 203, 218, 441, 443-51, 461, 469, 588, 610, 620, 626; Vol. 4, pp. 137-53, 161-66, 209-10, 314-15, 337.

As late as 1819, Jefferson wrote to Judge Spencer Roane: "A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than when citizens were suffering without the authority of law, or which was equivalent, under a law unauthorized by the constitution, and therefore null." Works, *supra,* Vol. XII, p. 138. Jefferson considered the defeat of the Federalists and the demise of the Sedition Act in 1800 "as real a revolution in the principles of our government as that of 1776 was in its form" (*Id.,* p. 136).[113] The First Amendment to Jefferson meant "that the legislative powers of the government reach actions only, and not opinions." He stated "that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy . . .; that it is time

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[113] *Cf.*, the statement of the Court of Appeals here: "The law which was passed in 1940 was passed to meet emergencies created by war although not especially to meet the threat involved in this case. That enactment has been denounced as the first peacetime sedition law since 1798, although anyone who believes the country was not at war in 1940 does not squarely face the facts of life. If the founders were advised that statute was necessary to meet the threat of the excesses of the French Jacobins then tending toward world-wide imperialism with a fatalistic zeal and a crusading flair and therefore compatible with the new Constitution, the Act of 1940 was probably advisedly deemed necessary by the Congress to provide for the national defense and protect the national ideals and aspirations." [Clk. R. 136.]

enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Works, *supra*, Vol. II, pp. 440-1. About one hundred years later, this Court, quoting the words of Jefferson, stated: "In these two sentences is found the true distinction between what properly belongs to the Church and what to the State." *Reynolds v. United States*, 98 U. S. 145, 163.

If history, therefore, is to be an aid in the discovery of the rational principle which marks the line between where the freedom of an individual ends and the power of the State begins—at least in the area of freedom of political expression—the true rule would appear to be that only unlawful action and utterances which directly incite to unlawful action are the exception to the fundamental societal principles embodied in the First Amendment.[114] Such appears to be the message of history, translated into living law by an almost unbroken line of decisions of this Court. This confluence of law and history is exemplified in the words of Chief Justice Hughes, writing for a unanimous court, in *De Jonge v. Oregon*, 229 U. S. 353, 364-5:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the

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[114] "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev., 682, 688 (1931).

importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

The application of these principles in particular cases throughout the history of this Court shows no intent to deviate from the line drawn between advocacy of ideas and incitement to action. Whatever differences may have occurred between the Justices as to the sufficiency of proof in different cases, tested by the requirements of the Constitution, no statute punishing speech has ever been construed "to assimilate agitation, legitimate as such, with direct incitement to violent resistance." Judge Learned Hand in *Masses Pub. Co. v. Patten,* 244 Fed. 535, 540 (D. C. N. Y., 1917).

In *Fox v. Washington,* 236 U. S. 273, the statute punished writings inciting to the commission of crimes, or which "tended" to incite to their commission. Justice Holmes stated: "It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." The statute, as construed, deals only with conduct which "would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged . . ." (*Id.,* p. 277). In *Schenck v. United States,* 249 U. S.

47, Justice Holmes analogized the case to a man "falsely shouting fire in a theatre, and causing a panic" or the utterance of words which may have "all the effect of force" (*Id.*, p. 52).[115] In *Frohwerk v. United States*, 249 U. S. 204, 206, Justice Holmes stated that to make "criminal the counselling of a murder within the jurisdiction of Congress would [not] be an unconstitutional interference with free speech." In *Debs v. United States*, 249 U. S. 211, the same Justice expressed the view that the general theme of the speech would not be enough to protect the utterer, if passages in the same speech contained incitements to obstruct the draft "directly given" (*Id.*, p. 213). In all these cases, the broad immunity granted by the First Amendment is in fact emphasized by the limited exceptions instanced by Justice Holmes. That the interest to be protected was freedom of speech on the one hand, and the right of the Government to deal with unlawful action and incitements to unlawful action on the other hand, seems evident.

The division of opinion in this Court which followed thereafter shows no disagreement on this issue. In *Abrams v. United States*, 250 U. S. 616, the majority thought that the language of the leaflets plainly incited to "dissaffection, sedition, riots . . ." (p. 623). Justice Holmes thought that the statements were merely "expressions of opinion and exhortations." In *Pierce v. United States*, 252 U. S. 239, 273, Justice Brandeis stated: "The fundamental right of free men to strive for

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[115] "The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement" Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 536, referring to the split in the opinions which followed *Schenck*.

better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law." In *Schaefer v. United States,* 251 U. S. 466, 493, Justice Brandeis added: "The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts, but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance."

Because of the nature of the statute involved in *Gitlow v. New York,* 268 U. S. 652, punishing the advocacy and teaching of the forcible overthrow of organized government, it may be appropriate to consider the decision of this Court in that case in more detail. At the outset, this Court noted the construction of the statute by the trial court (p. 661):

> "The court, among other things, charged the jury, in substance, . . . that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice, or advocacy *of action,* would not constitute the advocacy, advice, or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, *unless* there was a teaching, advising, and advocacy of *employing such unlawful acts* for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate, or advise the duty, necessity, or propriety of using unlawful means for the

overthrow of organized government, the defendant was entitled to an acquittal." (Emphasis supplied.)

This Court stated: "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of *incitement to any concrete action* . . . It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, *but the advocacy of action for the accomplishment of that purpose* . . . This [Manifesto] is not the expression of philosophical abstraction, the mere prediction of future events; *it is the language of direct incitement* . . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overwhelming organized government by force, violence, and unlawful means, *but action to that end*, is clear . . . That utterances *inciting to the overthrow of organized government by unlawful means* present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear" (pp. 664-69) (emphasis supplied).

Concurring in *Whitney v. California*, 274 U. S. 357, Justice Brandei stated (p. 376): "The wide difference between advocacy and incitement . . . must be borne in mind." In *Stromberg v. California*, 283 U. S. 359, Chief Justice Hughes did not doubt that statutes punishing utterances which "incite to violence and crime" were valid, but "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [free political discussion] is repugnant to the guaranty of liberty contained in the 14th Amendment" (p. 369).

As we have already noted, Chief Justice Hughes stated that the very "security of the Republic" depends upon a

recognition of the exceptional character of the "incitement to action" limitation upon the indispensable right to freedom of political expression guaranteed by the First Amendment. A pervasive recognition of this principle appears in all subsequent relevant decisions of this Court. In *Herndon v. Lowry,* 301 U. S. 242, the law as construed was held invalid because not limited to "incitement to violent interference with any given activity or operation of the state" (p. 261). In *Cantwell v. Connecticut,* 310 U. S. 296, the statute was not narrowly drawn to define and punish "specific conduct"; it was held invalid because it purported to punish more than incitements to "violence and breaches of the peace" (p. 310). In *Chaplinsky v. New Hampshire,* 315 U. S. 568, this Court spoke of "certain well-defined and narrowly limited classes of speech . . .—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (pp. 571-2). In *Murdock v. Pennsylvania,* 319 U. S. 105, it was noted that the accused was "not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation" (p. 116). In *Thomas v. Collins,* 323 U. S. 516, a majority thought that free trade in ideas "means free trade in the opportunity to persuade to action, not merely to describe facts," but that the limit of the right would be passed "when to this persuasion other things are added which bring about coercion" (p. 537). In *Musser v. Utah,* 333 U. S. 95, Justice Rutledge repeated that "At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of prob-

ability that the substantive evil actually will result" (p. 101). And in *Winters v. New York,* 333 U. S. 507, both majority and dissent recognized the importance of limiting the statute only to punishment of utterances which "become vehicles for inciting violent and depraved crimes," differing only on the need for a more certain specification of the publications interdicted in the light of First Amendment guarantees (pp. 519, 527).

Coming to the contemporary scene, the unifying principle of the aforesaid cases continues unabated in the recent decisions of this Court. In *American Communications Association v. Douds,* 339 U. S. 382, Chief Justice Vinson emphasized that repression could be directed only against "unlawful conduct and, under some circumstances, *against incitements to commit unlawful acts* . . . Only, therefore, when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented" (pp 394, 395) (emphasis supplied). In *Feiner v. New York,* 340 U. S. 315, the accused passed "the bounds of argument or persuasion and [undertook] incitement to riot." The police were not "powerless to prevent a breach of the peace" (p. 321). At the very term that *Dennis* was decided, Justice Reed, with whom the Chief Justice and Justice Minton joined, stated: "Tolerant as we are of all political efforts by argument or persuasion to change the basis of our social economic or political life, *the line is drawn sharply and clearly* at any *act* or *incitement to act* in violation of our constitutional processes." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 193 (emphasis supplied). As late as *Beauharnais v. Illinois,* 343 U. S. 250, Justice Reed stated (p. 279): "So important to a constitutional democracy is the right

of discussion that any challenge to legislative abridgement of those privileges of a free people calls for careful judicial appraisal [citing *De Jonge v. Oregon, supra*]. It is when speech becomes an incitement to crime that the right freely to exhort may be abridged."[11]

Since the grant of certiorari herein, this court has decided *Pennsylvania v. Nelson,* .....U.S.....; 100 L.ed. (Adv. Op.) 415. Justices Reed, Burton and Minton dissenting therein stated (a proposition on which there was no conflict with the opinion of the majority): "We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either." *Ibid.*, p. 426.

From this analysis of political and legal history, at least the following conclusions can appropriately be drawn: The 18th Century in England was marked by a changing conception of the relation between ruler and subject, a change from the view of rule by divine right to rule by consent of the governed; the social and economic changes which brought about this changed conception necessarily engendered the libertarian and utilitarian philosophy that if rulers were to be responsive to the will of the people, the broadest freedom of political expression must be per-

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[11] In opposition to the petition for writ of certiorari, the United States argued this Court "has *never* suggested that the distinction" between freedom of political expression and the limitations upon that right "must be phrased in terms of incitement". (Br. p. 55). This was not the theory of the United States at the trial (Supp App. to App. Reply Br., pp. 35-6). The necessity of supporting the rulings of the courts below, with their definite exclusion of the issue of "incitement to action" from the case, has apparently brought about a change of position on the part of the prosecution. Mere expediency, however, cannot obliterate the political and legal history of centuries, nor can civil courts become the mere instruments of executive policy.

mitted;[117] the advent of this philosophy marked the decline of the related offenses of constructive treason and seditious libel and, in England, by the end of the 18th century, prosecutions for these offenses had virtually ceased to exist.[118]

In the United States, the adoption of the Constitution and the First Amendment, together with the defeat of the Federalist Party in 1800, emphasized that the federal government was to be truly a government of limited powers existing solely by consent of the governed and that freedom of speech, press and assembly was an area necessarily free from governmental intrusion[119] in a self-governing society; that the Jeffersonian philosophy contemplated the power of government as limited only to the punishment of unlawful action, while leaving unimpaired the expression of beliefs, opinions or ideas, no matter how much they touched the "heart of things;[120] that this

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[117] "Other liberties are held *under* governments, but the liberty of opinion keeps Governments themselves in due subjection to their duties." Erskine, *Defense of Paine* in Writings of Thomas Paine (Wheeler ed., 1908), vol. I, p. 147.

[118] "Since that time, the utmost latitude of criticism and invective has been permitted to the press, in discussing public means and measures. The law has rarely been appealed to, even for the exposure of malignity and falsehood. Prosecutions for libel, like the censorship, have fallen out of our constitutional system." May, *Constitutional History of England* (1880), vol. II, p. 213.

[119] "The general principle of free speech, it seems to me, must be taken to be included in the 14th Amendment, in the view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation *than is allowed to Congress by the sweeping languague that governs, or ought to govern, the laws of the United States.*" Justice Holmes in *Gitlow v. New York*, 268 U. S. 652, 672 (emphasis supplied).

[120] "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Works, *supra*, vol. IX, p. 195, The First Inaugural Address, March 4, 1801.

Court has never doubted since its inception that the security of the nation depends upon untrammeled freedom of political expression; that in testing the constitutional validity of statutes which purport to limit that right this Court has accepted only the well defined exception familiar to the founding fathers, that speech is punishable only when proven to be a direct incitement to unlawful action; that in the area of political expression, only those can be punished (1) who directly incite to unlawful action, the instigators of crime (accessory before the fact); who (2) thus incite with specific intent to accomplish the unlawful action (*mens rea*); and (3) who thus wilfully incite to action under circumstances where the unlawful action is very likely to come about (attempt); that a statute by its terms or as construed which permits the punishment of other activities in the area of political expression constituting speech, press and assembly cannot stand consistent with the broad immunities granted by the First Amendment and the limitations on the powers of government in our constitutional system.[121]

D. The Construction of the Smith Act by the Courts Below—Instructions to the Jury.

In light of the aforesaid, we now examine "whether the judge's charge properly explained to the jury what it is that the Smith Act condemns." If the statute under the Constitution punishes only language of incitement to action, only language which includes a call for action, a direct instigation to crime, it would at the outset appear incongruous to assert that the jury must have so under-

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[121] "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." Justice Frankfurter in *Marsh v. Alabama*, 326 U. S. 501, 511.

stood it—when both the trial court and the Court of Appeals did not. As we have demonstrated, the trial court insisted that the statute punished all statements of the proscribed doctrine, "whether in language of incitement or not," and the Court of Appeals affirmed that instructions on incitement were "supererogatory" since the agreement of the accused was punishable even if the contemplated advocacy and teaching were "immunized by the constitutional guarantees."

Clearly, such words as "advocate" or "teach" do not necessarily connote to the ordinary person "incitement to action" or "instigation to crime." They are generally words which mean the highest form of appeals to reason, of discussion and debate, of argument and counter-argument. At least, the jury before whom the "advocates" here argued the cause might have so understood. Just as there can be discussion of facts without advocacy or teaching, so there can be advocacy or teaching of ideas without incitement to action. "The press does have the right, which is its professional function, to criticize and to advocate." Justice Frankfurter in *Pennekamp v. Florida*, 328 U. S. 331, 365. Indeed, unless there be precise limitation and definition, the "supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation" may put the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his

intent and meaning." *Thomas v. Collins*, 323 U. S. 516, 535.[122]

The trial court's instructions followed precisely its theory of the case, all of which was adopted by the Court of Appeals. The Smith Act, according to the trial court, punishes all advocacy and teaching of the forcible overthrow of the Government if accompanied by a specific intent, and the jury was so instructed [R. 13,728-73, App. Item 2(a), 2(p), pp. 3-69]. The word "incitement" does not appear in the instructions at all. The words "action," "incitement to action," "call for action," or "direct instigation to crime" are totally absent from the instructions. The jury was nowhere in the instructions or at any other point in the case told that the Smith Act does not denounce the abstract doctrine of forcible overthrow of the Government. All of this in varying forms the trial court, it should be recalled, was asked to instruct the jury by both the petitioners and by the United States, and refused.

The trial judge charged the jury it could convict if the evidence showed beyond a reasonable doubt that the conspiracy as alleged in the indictment (the indictment

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[122]Justice Holmes gave the same warning in *Gitlow*. He stated: "Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result" (p. 673). Coming as this did from the writer of the opinion in *Fox v. Washington*, it emphasizes the importance of clearly distinguishing between activities which directly incite to unlawful action and protected forms of activities, the most important "question of fact" in every prosecution of speech.

paraphrased the statute without limitation) was formed at the time alleged; that the accused wilfully became a member thereof; with the proscribed specific intent; and if an overt act was committed in furtherance of the conspiracy. This instruction was twice repeated [Inst. 11-G, R. 13,746-7, App. Item 2(d), p, 24; Inst. 14, R. 13,758, App. Item 2(h), p. 40]. The Court of Appeals held that there was evidence from which the jury might find (a) that the "conspiracy as charged in the indictment" was formed in 1940; (b) that each of the accused knowingly "entered into the combination"; (c) that "at least one overt act" was committed; (d) that each of the accused joined the conspiracy with the "specific intent" [Clk. R. 132]. Thus, in the instructions, and refusals to instruct, in their purposeful exclusion of the issue of "incitement" from consideration by the jury, the court below gave to the Smith Act an all-encompassing construction, neither supported by *Dennis* or *Gitlow* nor by constitutional law or history, as we have attempted to show.

Moreover, where the trial court defined the words "advocate" and "teach" in its instructions, it was careful to avoid any definition of the nature of those words in terms of a call for action or instigation to crime; this despite the proffered instructions of petitioners and the United States. Thus, the court instructed the jury that the word "advocate" means "to urge" or "to plead in favor of" or "support" or "vindicate" or "recommend publicly." The jury was told that the word "teach" means "to instruct" or "show how" or "guide the studies of " [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. Without in any way having informed the jury that such

advocacy or teaching, so broadly defined, must be in language of incitement to action, a reasonable jury could assume that the Smith Act punishes any discussion or advocacy or teaching of the idea of the forcible overthrow of the Government under any circumstances in any place and in any manner, so long as the jury found the requisite specific intent.[123]

At every point in its instructions, the trial court made certain to leave this unlimited construction of the Smith Act intact. The court instructed the jury that "prediction or prophecy" is not advocacy [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. This is of course plain, but the trial court did not instruct the jury that the contemplated advocacy which they were bound to find from the evidence was advocacy in language of incitement to action with the intent that such advocacy be as a rule or principle of action.

Because the indictment did not allege that petitioners conspired to advocate and teach the forcible overthrow of the Government by unlawful or unconstitutional means other than force and violence, the court instructed the jury that any advocacy or teaching which did not include the urging of force and violence "as the means" of overthrowing the Government was not "within the issue of the

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[123]Dictionary definitions include the following: "urge"—"to press by inquiry or statement; to adduce or bring forward arguments, allegations, etc."; "plead"—"to contend in debate; to wrangle, argue *with, against*"; "support"—"to back up in a statement or an opinion"; "vindicate"—"to justify or uphold by evidence or argument"; "recommend"—"to communicate to a person"; "instruct"—"to furnish with knowledge or information"; "show how"—"to make known by statement or argument"; "guide the studies"—to direct the "application of mind to the acquisition of learning." Oxford English Dictionary (1933); Shorter Oxford English Dictionary (1933).

indictment" [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. The instruction added nothing however to the meaning of the Smith Act insofar as the distinction between the exposition of ideas and advocacy and teaching in language of incitement to action was concerned. One can urge a point of view without calling upon persons to act upon that viewpoint. Urging the duty and necessity of the violent overthrow of the Government can be either advocacy of an idea or concept on the one hand or a call to action on the other. The jury was not informed that the Smith Act does not punish "advocacy" or "urging" or "vindicating" the forcible overthrow of the Government as a matter of abstract doctrine (*American Communications Associations v. Douds*, 339 U. S. 382, 439-42],[124] but that the Smith Act punishes only such advocacy or urging when in language reasonably and ordinarily calculated to incite persons to action.

Moreover, when the trial court informed the jury that the petitioners had some rights under the Constitution, it was again careful to exclude any protection for utterances found by the jury to be equivalent to the idea of forcible overthrow of the Government. The jury was told that petitioners' "general right," "in common with all other persons living under our Constitution" to "advo-

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[124]To Justice Jackson's recital of "revolutionary" utterances, a more contemporary statement could be added: "The soul of man cannot be altogether and forever bound in, a fact by virtue of which with time the most unyielding despotism must come to earth. *On it rests the inalienable right of revolution which our fathers exercised in the Declaration of Independence.*" Wiley Rutledge, *A Declaration of Legal Faith* (1947), p. 7 (emphasis supplied).

cate opinion" was not affected by the lack of popular support therefor. The Court went so far as to give the jury specific illustrations of the character of opinions falling within this "general right"; these were: "the advocacy or teaching of socialism," "criticism" of "our system of Government and the Government itself" and of "the foreign policy of the United States and the role being played by this country in international affairs" and "praise" of "the foreign policy of other governments and the role being played by these governments in international affairs" [Insts. 12-E, 12-F, R. 13,754-55, App. Item 2(f), pp. 34-36]. Not only did the Court fail to include in the list of opinions which might lawfully be expressed the crucial one, the proposition that the government should be overthrown by force and violence, but it made it clear that this opinion was specifically excluded. For after specifically enumerating the opinions which might be lawfully expressed, the Court told the jury: "No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of the United States by force and violence . . . may be drawn from such expressions alone. The burden is upon the prosecution to prove beyond a reasonable doubt that the defendants conspired to advocate the duty and necessity of the overthrow and destruction of the government by force and violence" [Insts. 12-E, 12-F, 12-G, R. 13,754-6, App. Item 2(f), pp. 34-6]. Thus the Court explicitly told the jury that while the petitioners had the right to advocate other opinions they could not

legally advocate the opinion that government should be violently overthrown.[125]

In attempting to justify the exclusion of the issue of incitement by the trial court from the jury's consideration, the opinion of the Court of Appeals serves only to emphasize the vice of the unlimited construction given the Smith Act under the Constitution. The Court of Appeals states, first, that the indictment "by its inherent terms" charged that "the language of incitement was used" [Clk. R. 117], meaning, of course, that the words do not explicitly appear in the indictment at all. If the element of incitement was "inherent" in the indictment, the duty rested all the more upon the trial judge to instruct the jury explicitly and unequivocally on the issue. *Bollenbach v. United States,* 326 U. S. 607, 613. Where the Constitution fixes the standards for the determination of where the freedom of an individual ends and the power of the State begins, an accused is entitled to have the jury instructed precisely in accordance with those standards. See, *United Brotherhood v. United States,* 330 U. S. 395; *Terminiello v. City of Chicago,* 337 U. S. 1; *St. Paul Fire and Marine Insurance Co. v. Bachmann,* 285 U. S. 112. The issue of "incitement to action" is

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[125]In another portion of this brief petitioners argue that the evidence was insufficient to support the charge contained in the indictment. The record is barren of any evidence that the contemplated advocacy and teaching of Marxism-Leninism by the petitioners was to be in language of incitement to action. This most important "issue of fact" was removed from the jury's consideration, leaving them to determine that any contemplated "teaching" or "instructing" or "support", etc., etc. of the principles of Marxism-Leninism, with unlawful intent, was punishable under the Smith Act despite the Constitution. How serious was the error committed here can be gathered from the dissent of Judges Hastie and Maris in *United States v. Mesarosh,* 223 F. 2d 449, 459-64 (C. A. 3, 1955), where the instruction on incitement to action was given (p. 460), the Judges disagreeing on the sufficiency of the evidence with respect thereto.

one of the most important questions of fact which a jury in a speech case has to decide, for upon the determination of that issue rests the power of the court to apply the sanctions of the law to the accused despite the protective guarantees of the Constitution.

Moreover, instructions "should be clear and understandable, whether they purport to define issues of fact or to state the law applicable to a particular situation. They should be definite and certain, as applied to the facts of the case at bar, leaving nothing to inference. They should be intelligible, free from obscurity, involvement, ambiguity, metaphysical intricacy and doubt. The language of an instruction should be so plain that no doubt can arise as to its meaning, and that there is no chance of misunderstanding." 53 *Am. Jur.*, "Trial," Section 545, p. 434. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U. S. 607, 613. See, *Kraus & Bros. v. United States*, 327 U. S. 614, 627.

The Court of Appeals stated "that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute" [Clk. R. 129]. But this begs the question here; it does not answer it. If the law punishes only a "criminal design" to advocate *in language of incitement to action*, the petitioners were entitled to an instruction that no petitioner could be found guilty unless he was a party to such criminal plan. If there was no such "criminal design," the mere fact that one of the accused entered the "field of action"—as, for example, participated

in a lawful public meeting held under the auspices of the Communist Party—would not make criminal the agreement which was not criminal in its inception. Under the instructions, the entry into the "field of action" could be established by showing entry into the field of opinion, absent any relationship to a call to action. See the trenchant discussion by Judge Frank in *United States v. Ausmeier*, 152 F. 2d 349, 356-8 (C. A. 2, 1945).

The fact is that the Court of Appeals, like the trial court, held that the question of incitement was properly excluded entirely from the jury's consideration [Clk. R. 128-9]. The Court took the position that the 1948 codification of the Criminal Code had effected drastic changes in the issues of a Smith Act prosecution [Clk. R. 110-11], that unlike *Dennis*, a "standard conspiracy" was here charged, and that instructions on incitement to action would now be supererogatory. A new construction and application has been given to the Smith Act by the courts below: that any violation of the literal terms of the statute is punishable so long as the jury finds the proscribed intent.[126] This is the traditional form of the repressive laws of the Middle Ages and the prevalent form of the treason and sedition statutes of the 16th and 17th centuries in England, so "capably" administered by Star Chamber and the tribunal of a Jeffrys in the King's behalf. The question presented is whether, consistent with constitutional law and history, such a statute as construed below can be upheld.

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[126]In opposition to the petition for writ of certiorari, the respondent stated that it was "immaterial" whether the Court of Appeals was correct in the reasoning which led the Court to approve the exclusion of the issue of incitement to action from the case because, according to respondent, a "specific charge was not required" on incitement to action under the Smith Act as interpreted by this Court in *Dennis* (Br. pp. 59-60). As we have shown, this was not the view of the respondent in the trial court (*supra*, p. 112, n. 69.)

E. The Validity of the Smith Act as Construed by the Courts Below.

Our résumé of law and history above conclusively establishes, it is respectfully submitted, that the construction of the statute by the courts below is constitutionally invalid. Some additional observations should be made in conclusion.

(1) If all that were necessary to dispose of the issue here was "practical expediency," the holdings of the courts below could not be sustained. No "practical" reason can be advanced for excluding the question of incitement from Smith Act prosecutions, unless it be that it is easier to convict outside the law than within it. In virtually every case which has followed *Dennis*, the trial and appellate courts have stressed the importance of the instruction on incitement to action. In the second Smith Act prosecution in New York, Judge Dimock not only gave the instruction approved by this Court, but in further amplification told the jury, in effect, that words of incitement to action means words which would inflame or spur some ordinarily reasonable person *to act—words which cause a reasonable person to act; and not merely to think things over. United States v. Flynn*, unreported [D.C. S.D. N.Y., 1953, C. 137-7] (emphasis supplied). District Judge Chesnut gave the instruction in *Frankfeld v. United States*, the Baltimore prosecution. On appeal, Chief Judge Parker stated:

> "The judge made it clear that the Communist Party could teach the abstract doctrine of overthrowing the government by force so long as it did not advocate action to that effect, saying:
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> "'And in this connection I further instruct you that the Smith Act is not aimed against the teaching

of the mere abstract doctrine of overthrowing the government or the mere teaching of the historical doctrine of Marxism or Leninism. The Communist Party and its members are entitled to do this so long as their teaching does not go to the extent of advocating action for the accomplishment of a violent revolution by language reasonably and ordinarily calculated to incite persons to such action.'"

198 F. 2d 679, 687 (C. A. 4, 1952).

District Judge Marsh gave the incitement instruction in Pittsburgh, *United States v. Mesarosh*, 223 F. 2d 449, 460 (C. A. 3, 1955), informing the jury that it was an essential ingredient of the offense charged. The instruction was given by District Judge Picard in the Smith Act trial in Detroit; by District Judge Harper in the trial in St. Louis; and by District Judge Breitenstein in the trial in Denver. Only two trial judges, both in the Ninth Circuit, in trials which followed the one herein, emulated the trial court below, and this in almost verbatim language.

(2) The statute, as construed, undermines principles of liberty and freedom which this Court has uniformly defended. Justice Holmes once stated that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U. S. 644, 654-5. In *Abrams v. United States*, 250 U. S. 616, 6[illegible], Justice Holmes added that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." As to the character of that "competition," this Court stated: "In the realm of religious faith, and

in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. A pervasive recognition of these truths runs through the varying opinions of this Court. Only recently this Court struck down infringements upon "the freedoms that are the ultimate values of all democratic living". Justice Clark in *Wieman v. Updegraff*, 344 U. S. 183, 188.

(3) While this Court has denied that there is a constitutional "right to revolt," or to attempt or conspire to forcibly overthrow the Government, or to incite to action for such purpose, it has never held that the Constitution prohibits any advocacy or discussion or teaching of the idea of forcible overthrow of the Government. As Justice Jackson stated: ". . . we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified. That circumstances sometimes justify it is not Communist doctrine but an old American belief." *American Communications Association v. Douds*, 339 U. S. 382, 439.

Nor should it be overlooked that a statute which punishes advocacy and teaching of the overthrow of the Government by force and violence, as broadly construed by the courts below, stands as a permanent censor over the minds of men. Today the "principles of Marxism-Leninism" may be thus proscribed; yesterday it was the

principles of the Jeffersonian Republicans; and the day before yesterday the religious creeds which offended Henry VIII or James II. There is no certainty under such a law that today's orthodoxy will not be tomorrow's heresy. Here, indeed, "a page of history is worth a volume of logic." Professor Chafee states:

> "There are fashions in sedition laws as in everything else. The draftsmen of 1798 went for a model to the English seditious libel prosecutions just ahead of their day, and imported into their statute phrases like 'intent to bring the government into contempt or disrepute.' The draftsmen of 1940 likewise found their model in the sedition laws just ahead of them, which happened to be the New York Anarchy Act and the Criminal Syndicalism Acts. Aside from the greater severity of sentences, the only big change during the intervening hundred odd years is in phraseology. Instead of saying 'to excite against the government the hatred of the good people of the United States,' sedition laws now say, 'to advocate the overthrow of the government by force or violence.' Yet the new words work out in much the same way as the old words."
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> "The truth is that the precise language of a sedition law is like the inscription on a sword. What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies."
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> *Freedom of Speech* (1941), pp. 466-7.

(4) The Courts below have proscribed all advocacy of the forcible overthrow of the Government if accompanied by an evil intent. As Justice Brandeis pointed out, such construction of the law leads to punishment for "disloyal hearts," not for unlawful conduct.[127] "And, historically, most of the excesses of the English law of treason, prior to the eighteenth century, can be described in terms of a treasonable intent found by inference under the head of compassing the death of the King; men were convicted not on evidence fairly showing that they had planned the King's death and the overthrow of the government, but on the basis of the expression or advocacy of ideas or measures whose 'natural' consequences, as deduced by their political foes, might involve harm to the king or the state." Hurst, *Treason in the United States,* 58 Harv. L. Rev. 226, 815 (1945).

When ideas devoid of incitement to action become punishable because of the supposed wicked intent with which they are delivered, the practice arises to infer the proscribed intent not from acts of the accused, but from the bad tendency of the ideas which he has expressed. ". . ., under the Federalist judges, intent to turn out

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[127] "Marsyas dreamt that he had cut Dionysius' throat. Dionysius put him to death, pretending that he would never have dreamt of such a thing by night, if he had not thought of it by day. This was a most tyrannical action; for though it had been the subject of his thoughts, yet he had made no attempt towards it. The laws do not take upon them to punish any other than overt acts." Montesquieu, *Spirit of Laws* (1873 ed.), vol. I, Book XII, Ch. XI, p. 221.

the party in office was construed into intent to excite seditious acts." Miller, *Crisis in Freedom* (1951), p. 137. Madison stated: "To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct." *Report on Virginia Resolutions* in 4 Elliot's Debates (2nd ed.), p. 575. See also, Chafee, *Free Speech* (1920), pp. 25-30.

(5) Finally, a sedition law as broad as the one construed here, may prevent "the discovery of grievances which need removal" and suppress "much good with a little bad." Chafee, *supra* (1941), pp. 187, 188. For, "coupled with such advocacy is criticism of defects in our society . . . Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed . . . we can hardly escape restriction on the interchange of ideas . . . Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved." Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 549, 556.

The protection of ideas we "hate" is, therefore, not merely for the benefit of a minority; in a more significant sense it is the majority who are in danger whenever an idea is suppressed. If an idea is false, it is important for the people to know why it is false. The defense of the "right" without knowing why it is "right" is sheer prejudice and valueless. If it is true, a free society cannot exist without hearing the idea, for truth is the only way of correcting error. If it is partially true and partially false, no progress can be achieved if we bury the truth along with the false. John Stuart Mill, *On Liberty*. It is a truism of history that any revolutionary doctrine has always included ideas of much needed reform, reforms which generally have found their way into the political and social fabric of society. "The only reason for dwelling on all this is that if we are to preserve democracy we must understand its principles. And the principle which distinguishes it from all other forms of government is that in a democracy the opposition not only is tolerated as constitutional but must be maintained because it is in fact indispensable." Walter Lippman, *The Indispensable Opposition* in Commager, Living Ideas in America (1951), p. 402.

Chief Justice Hughes stressed in *De Jonge* that "security of the Republic, the very foundation of constitutional government" depends upon upholding the fundamental rights of free speech, free press and free assembly to the end that "changes, if desired, may be obtained by

peaceful means." He stated this faith for a unanimous Court notwithstanding the alleged "objectives of the Communist Party." It is undoubtedly true, as the Chief Justice suggested, that it is the rare case where violence occurs in effecting social or political changes when democracy is freely extended; it is almost the universal rule that it takes place when freedom is denied. George III equated the doctrine of "no taxation without representation" with "treason"; the War of Independence followed and an empire fell in the New World. Calhoun and the slave owners equated "abolition of slavery" with "incendiary insurrection"; the "irrepressible conflict" was on. The fact is, as history seems to show, that governments, and society, gain security, order and confidence when repressive legislation is foregone.

For all of the aforesaid reasons, it is submitted that the rulings of the courts below should not stand. The expansion of the Smith Act to permit widespread encroachments on basic freedoms runs counter to law and history. In *Dennis*, this Court drew the line between liberty and governmental power at "incitement to action," a principle intended at least to unify the democratic process; it should not countenance so soon thereafter, a principle which would obliterate that line and leave liberty entirely dependent upon the arbitrary exercise of governmental power.

IV.

The Refusal of the Trial Court Either to Itself Rule on the Issue of "Clear and Present Danger" or to Instruct the Jury With Respect to the Pertinent Jury Questions Relating Thereto, Together With the Trial Court's Equation of "Clear and Present Danger" Solely With the Alleged Agreement to Advocate Plus the Alleged Individual "Intent," Resulted in an Unconstitutional Application of the Statute to These Petitioners; and the Trial Court Should Have Directed an Acquittal of the Petitioners Because of the Absence of Any Basis for a Finding of Clear and Present Danger.

In *Dennis* this Court held that the issue of "clear and present danger" was a question of law which the trial court was required to decide upon its evaluation of the evidence, subject to the jury's verdict under proper instructions. The statute could be constitutionally applied, this Court decided, only upon proof beyond a reasonable doubt: (a) that the accused conspired to advocate and teach the forcible overthrow of the Government (341 U. S. at pp. 497-98); (b) by language reasonably and ordinarily calculated to incite persons to such action (341 U. S. at pp. 511-12); (c) with the intent that such advocacy and teaching be of a rule or principle of action (341 U. S. at p. 512); (d) with the power of the accused to bring about an attempted forcible overthrow of the Government (341 U. S. at p. 516); (e) with the accused's activities in their very nature directed to the attainment of the objects of the conspiracy (341 U. S. at p. 516); and (f) all with the specific intent to accomplish the forcible overthrow of the Government as speedily as circumstances would permit (341 U. S. at pp. 499-500).

Only when such findings were "coupled with the inflammable nature of world conditions" (341 U. S. at p. 511) did this Court hold that the statute could be constitutionally applied to the accused. The courts below refused to consider, or to instruct the jury to consider, elements b, c, d and e. Excluded from the case were questions of advocacy, in language of incitement to action, intent that the advocacy be of a rule or principle of action, power to bring about the evil, and the nature of petitioners' activities. Court and jury considered only "conspiracy" and "unlawful intent." This excision of the very heart of the clear and present danger doctrine permitted the conviction of petitioners for the exercise of the freedom of speech which the Constitution guarantees. We turn now to a more detailed consideration of the rulings of the courts below.

A. In dismissing the original indictment, the trial judge held that the "clear danger" is the advocacy of the forcible overthrow of government "with intent to bring about ultimately the overthrow of government by means of force or violence"; that the "present danger" consists in the specific intent of such advocate to accomplish such forcible overthrow "as speedily as possible" (Cert. App. B, p. 64). When the motions for judgments of acquittal were denied, the trial judge in applying the "danger" rule distinguished between an attack upon the constitutional validity of a statute on its face, and an attack upon its particular application. According to the court, the "danger" rule serves "as the standard to be applied in testing the constitutionality on its face of a statute which restrains freedom of expression" (Cert. App. B, p. 135). However, when invoked as in the instant case, to test the constitutionality of the statute as applied, the "danger" rule only "furnishes

the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused" (Cert. App. B, p. 135). The court repeated that *any* advocacy and teaching of the forcible overthrow of the Government with intent ultimately to accomplish such overthrow was the "clear danger," and intent to accomplish such overthrow as speedily as possible was the "present danger" (Cert. App. B, pp. 136-7).

Thus the court held that the Smith Act could be constitutionally applied to any conspiracy to advocate and teach the forcible overthrow of the Government if the accused were shown to possess the proscribed state of mind. It refused to consider, or to require the jury to determine, whether the contemplated advocacy and teaching was to be in language of incitement to action or whether any evidence in the record established, objectively, that the petitioners had the power to bring about *unlawful action* or engaged in activities directed to that end. Petitioners urged, on motions for judgments of acquittal, that the evidence of the nature of their activities and of their power to bring about the evil at which the law is aimed was insufficient to support verdicts of guilt [Clk. R. 64, 67]. It was in response to these motions that the trial judge ruled these issues out of the case.[128]

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[128]The trial court could not have made the exclusion more plain. Referring to Chief Justice Vinson's language: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. 494, 516), the trial judge commented: "This does not mean a thing to me, Mr. Margolis. With all deference, it is not understandable to the lawyer. They are words; they are very kind words and they are all right. I have no quarrel with them at all, *but they do not mean a thing in my view to advance the holding in the case* . . . but we must remember that the justices of the Supreme Court . . . . write a great many words, sometimes that *are not necessary* to the decision" [R. 9680] (emphasis supplied).

Petitioners requested and the Court refused to give an instruction that a finding of power to bring about the evil was essential to verdicts against petitioners [Prop. Inst. 46, R. 13,824-825; App. Item 2(q), pp. 69, 75] and another that the prosecution had burden of establishing "that the nature of the activities of each such defendant had as their objective and purpose the advocacy and teaching of the duties and necessity of the overthrow and destruction of Government of the United States by force and violence" [Prop. Inst. 47, R. 13,825; App. Item 2(q), pp. 69, 76]. The sufficiency of the evidence to establish a conspiracy to use language of incitement was also challenged in the motions for judgments of acquittal [Clk. R. 68], and, as has been noted, instructions on this issue were also requested and refused (*supra*, p. 112).

By these rulings, the court eliminated for both itself and the jury all objective tests demanded by the "clear and present danger rule." Except for the subjective factor of intent an agreement to speak was in and of itself declared criminal without regard to its relationship to unlawful action.

To convert the "danger" rule into a gauge whereby the sufficiency of the evidence as to state of mind or intent of the accused alone is to be measured, is to irrationally equate an objective test with a subjective standard. The Constitution requires that *both* tests be satisfied so that the danger of action which Congress has the authority to prohibit be shown as an objective reality as well from the subjective wish of the accused.

B. Because of the manner in which the trial court here disposed of the question of clear and present danger,

it may be appropriate to examine in detail how differently the question was treated in *Dennis*. Judge Medina instructed the jury that the defendants could not be convicted unless the jury found beyond a reasonable doubt that the accused conspired to advocate and teach in language of incitement to action and as a rule or principle of action with the requisite specific intent. 9 F. R. D. 367, 391. Judge Medina further informed the jury that if they found the defendants guilty of a violation of the statute, as he had interpreted it, then he found a "sufficient danger of a substantive evil that the Congress has a right to prevent." And he added:

> "This is a matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support *my ruling that the case should be submitted to you* to pass upon the guilt or innocence of the defendants" (*id.*, p. 392). (Emphasis supplied).

In deciding to submit the case to the jury, Judge Medina was required to consider such factual issues as advocacy in language of incitement to action, the nature of the defendants' activities and their power to bring about the evil. Judge Hand, in the Court of Appeals, made this plain when he stated that the trial court's finding of "clear and present danger" was justified, stressing that the defendants were found to be the "controlling spirits" (183 F. 2d 201, 212) in the organization created as the alleged vehicle of the conspiracy; that the conspiracy and unlawful intent of the defendants was established (*id.*, p. 212); that the conspiracy contemplated advocacy and teaching in language of incitement to action (*id.*, p. 212); and that the activities of defendants had been directed toward that end (*id.*, p. 206). All of these facts, coupled

with the then "strains and tensions" of the international situation (*id.*, p. 213), warranted the trial court's finding of sufficient danger, stated Judge Hand. He agreed with Judge Medina that it is not enough "that the purpose of the utterer may include stirring up his hearers to illegal conduct—at least, when the utterance is political" (183 F. 2d 201, 212). In each case, stated Judge Hand, the courts may inquire whether the utterance itself, when "mixed or compounded" with language of incitement to action, is one which the First Amendment does not protect (*id.*, p. 212). ". . . they [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (*id.*, p. 212).

This Court, too, was explicit in *Dennis* that the "clear and present danger" rule was not merely a standard for measuring the state of mind of the accused. Chief Justice Vinson, early in the opinion, stated that the statute required, as an essential element of the crime, proof of a specific criminal intent. 341 U. S. at p. 499. But he went on to say that advocacy of forcible overthrow of Government, "even though coupled with the intent to accomplish that overthrow," contains an element of speech (*id.*, at p. 502), requiring consideration of the clear and present danger principles enunciated by this Court (pp. 503-11). "In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction" (pp. 514-5). To emphasize that the "clear and present danger" test was an objective test dependent upon many factors, and neither the same as nor dependent solely upon proof of a state of mind, Chief Justice Vinson added: "Where there is doubt as to the intent of the

defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (p. 516).

After approving Judge Medina's "essential" instruction on incitement to action, this Court placed its greatest emphasis upon the defendants' power to bring about the evil. Chief Justice Vinson noted the findings of the lower court that. *"By virtue of their control* over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party"; that the defendants had allegedly formed within the Party "a highly organized conspiracy, with rigidly disciplined members subject to call *when the leaders, these petitioners, felt that the time had come for action."* 341 U. S. 494, 498, 511 (emphasis supplied). And this Court emphasized, that while the question of clear and present danger is a question of law for the trial court to decide, still it is dependent for its answer upon a proper consideration of all the relevant facts (*id.*, p. 513). Further, this Court admonished that it was not making one general decision on "clear and present danger" for all future Smith Act prosecutions. ". . . the Court must examine judicially the application of the statute to *the particular situation,* to ascertain if the Constitution prohibits the conviction" *(id.*, pp. 514-5) (emphasis supplied).

C. The distinction between subjective intent and evidence of objective facts essential to a finding of clear and present danger is not novel to *Dennis.* In the very case where the clear and present danger rule was first enunciated (*Schenck v. United States,* 249 U. S. 47),

proof of the specific intent was virtually conceded (*id.*, p. 51). Yet Justice Holmes went on to announce the rule, stressing that it relates to "proximity and degree" (*id.*, p. 52). "Proximity" and "degree" are uniformly tests for overt conduct; they are not used as standards relating to a state of mind.

In *Pierce v. United States*, 252 U. S. 239, Justices Holmes and Brandeis agreed that there was not "a particle of evidence" to establish the specific intent (*id.*, p. 271). But they added: "Furthermore, *the nature of the words used* and *the circumstances under which they were used* showed affirmatively that they did not 'create a clear and present danger' that thereby the operations or success of our military and naval forces would be interfered with" (*id.*, p. 271) (emphasis supplied). See, Chafee, *Free Speech in the United States* (1941), pp. 57-60, 186. This Court summed the matter up in *Hartzel v. United States*, 322 U. S. 680, 686-7:

> "The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts. . . . The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. . . . Both elements must be proved by the Government beyond a reasonable doubt."

The "clear and present danger" doctrine, no matter how formulated, should not be permitted to become a device for circumventing the First Amendment and abridging the exercise of freedoms of speech, press and assembly. Congress, under the Constitution, has power to deal with unlawful action. It has no power to proscribe the dis-

cussion or advocacy of ideas. The "clear and present danger" doctrine is a rule of reason whereby a court in a speech case determines from the evidence whether an accused has actually been guilty of speech so proximately and immediately related to unlawful action that the prosecution is directed against the unlawful action rather than against protected speech. The ingredients of the test are all concerned with action. The question always is whether the nature of the words used in the circumstances of their utterance were such as directly to incite to unlawful action; whether the accused was directing his activities towards unlawful action and had the power to bring about a "substantive evil that Congress has a right to prevent" in a setting where such action might reasonably be contemplated. A court which ignores these considerations and construes a law of Congress as applicable to the mere exercise of speech, press and assembly "goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom." *Herndon v. Lowry,* 301 U. S. 242, 258-9.

There is persuasive evidence that the "clear and present danger" test was derived from the criteria applicable to criminal attempts. Holmes, *The Common Law* (1881), p. 68; Chafee, *Freedom of Speech in War Time,* 32 Harv. L. Rev. 932, 967 (1919); Green, J. R., *Liberty Under The Fourteenth Amendment,* 27 Wash. U. L. Q. 497, 539-40 (1942); Antieu, C. J., *The Rule of Clear and Present Danger—Its Origin and Application,* 13 Univ. of Det. L. J. 198 (1950). Dissenting in *Pierce v. United States,* 252 U. S. 239, 273, Justice Brandeis stated (Justice Holmes concurring): "The fundamental right of free men to strive for better conditions . . . will

not be preserved, if efforts to secure it by argument to fellow citizens may be construed *as criminal incitement to disobey the existing law*" (emphasis supplied). In *Cantwell v. Connecticut*, 310 U. S. 296, 310-11, Justice Roberts, speaking for a unanimous Court, stated: "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse . . . we think that, in the absence of a statute narrowly drawn to define and punish *specific conduct* as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question" (emphasis supplied). As recently as *American Communications Association v. Douds*, 339 U. S. 382, 395, Chief Justice Vinson stated: "By this means they [Justices Holmes and Brandeis] sought to convey the philosophy that, under the First Amendment, the public has a right to every man's views and every man the right to speak them. Government may cut him off *only* when his views are no longer merely views but *threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself*" (emphasis supplied).

In *Dennis*, this Court reformulated the "clear and present danger" doctrine, at least for cases relating to evils of great national magnitude, to "clear and probable danger."[8] But, in so holding, this Court recognized that constitutional limitations and guarantees could be maintained under the rule thus enlarged only by insistence

upon the highest standards of proof.[129] This Court stressed that the statute had been interpreted as punishing only advocacy and teaching in language of incitement to action; that if there was doubt as to the intent of the accused, the nature of their activities or their power to bring about "the evil," this Court would review the convictions with the scrupulous care demanded by the Constitution. Absent evidentiary requirements of the strictest character, the "clear and probable" application of the "clear and present" danger rule might serve mainly to camouflage abridgement of speech, press and assembly and, thereby, to increase the possibility of the extension of, rather than acting as a brake upon, the contraction of these freedoms.[130]

The unavoidable responsibility which this Court has assumed to review with scrupulous care the application

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[129]Petitioners submit, that although this case can be decided without reconsidering the clear and present danger rule as defined in *Dennis*, experience demonstrates that the rule thus construed maintains a barrier against punishment for speech all too frail to withstand the assaults on freedom of belief to be expected in times when public feeling runs high and when the protection afforded by the First Amendment for all the people, including particularly minorities is most critically needed. See the comments of the profession: Antieu, C. J., *"Clear and Present Danger"—Its Meaning and Significance*, 25 Notre Dame L. Rev. 603 (1950); *"The Rule of Clear and Present Danger: Scope of Its Applicability,"* 48 Mich. L. Rev. 811 (1950); *The Rule of Clear And Present Danger—Its Origin And Application*, 13 Univ. of Detroit L. J. 198 (1950); *Judicial Delimitation Of The First Amendment Freedoms*, 34 Marquette L. Rev. 57 (1950); Boudin, L., *"Seditious Doctrines" And "The Clear and Present Danger" Rule*, 38 Va. L. Rev. 143, 315 (1952); Nathanson, N. L., *The Communist Trial And The Clear And Present Danger Test*, 63 Harv. L. Rev. 1167 (1950). A second look at this rule as stated in *Dennis* is timely and is essential if our freedoms are to be maintained and expanded rather than weakened and restricted.

[130]This danger is not eliminated as long as the "clear and probable" construction is adhered to, but at least it is somewhat modified by the requirement that the danger be established by hard and trustworthy facts.

of the danger rule in free speech cases, does not minimize the function of the trial court. To the contrary, scrupulous care is also demanded of the trial court in making the initial determination. When the District Court in this case unequivocally declined to adjudge any essential fact except the question of unlawful intent; when it thrust from the case all consideration of questions of "incitement" or "power to bring about the evil" or the "nature" of an accused's activities, the District Court was eliminating from consideration the very issues of fact essential to a determination of the basic constitutional issue. Since these factual issues depend for their resolution upon the oral testimony of witnesses, their credibility, demeanor, etc., on direct and cross, the issues were peculiarly within the province of trial court and jury, a function which the trial court could not delegate to any reviewing court.[131] It is one thing for a trial court to consider all the essential facts and reach a correct result by erroneous reasoning; it is quite another for a trial court to reach a result through misapprehension of the law which leads both Court and jury to adjudicate rights without regard to the resolution of issues indispensable to such adjudication in the light of controlling law.

Here was a grave abandonment of the judicial function. Cf., *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 329.

> "The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness,

[131]Of course, where the record is insufficient to establish the requisite danger, as petitioners assert is the situation here, that determination should be made by this Court, regardless of what the trial court has done.

could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error."

Justice Brandeis in *Schaefer v. United States*, 251 U. S. 466, 483.

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"In application of such a standard [clear and present danger] courts may strike a wrong balance; they may tolerate 'incitements' which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights."

Judge Hand in *United States v. Dennis*, 183 F. 2d 201, 212 (C. A. 2, 1950).

D. Because the record in this case does not reveal a "danger" of unlawful action by any standard, the trial judge should have directed judgments of acquittal, and his failure to do so should be remedied by this Court. An examination of the entire record, as it relates to these petitioners (summarized in the Statement of the Case) permits no other conclusion. Aside from the insufficiency of the evidence to establish any petitioner's specific intent or connection with the conspiracy charged, or even the existence of any conspiracy at all, the record is devoid of evidence of an agreement to use language of incitement to the overthrow of the Government by violence at any time, let alone as speedily as circumstances permit.

To the extent that the powers of these petitioners individually or collectively can be ascertained from this record, they not only fail to establish but they negate any power to set in motion an attempt at violent revolution. Not a single petitioner was shown either to possess the requisite predominance or to have a voice in any body exercising such authority.[132] The respondent's theory must be that every member and officer of the Communist Party has the power to bring about the evil simply by virtue of such officership and membership. For respondent can show, in this record, no special power to command or initiate an attempt at violent overthrow by these petitioners.

The nature of petitioners' activities, as disclosed by the evidence, alone demands reversal and acquittal, unless we are to retrogress to the doctrine of seditious conspiracy which the First Amendment was designed to eradicate from our judicial system. The concept that any criticism of the King encompasses a plot to assassinate him cannot be distinguished from the respondent's theory that any dissent by a Communist is *ipso facto* part of a plot to

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[132]The Court of Appeals dismissed the issue of petitioners' power to bring about the evil as wholly irrelevant to the charge herein [Clk. R. 128]. All that the phrase meant in *Dennis*, stated the court below; was "that the setting in which the defendants there acted was such as to allow the court to conclude that the teachings might have resulted in an attempt at overthrow" [Clk. R. 108]. It is not the "setting" or "world conditions" which essentially determines when a law affecting speech shall be applied in a particular situation. If this were the rule, a large and multifarious body of contemporary public opinion in the United States would be doomed to silence. The question must always be, if First Amendment rights are to be preserved, whether those who agree to advocate ideas in language of incitement to action create such a clear and present danger of unlawful action under all the circumstances as to justify the application of criminal sanctions despite the guaranteed immunities of the First Amendment. It is not the "setting" which creates the danger; it is the power, in the setting, to utilize the speech to bring about the evil action which is the focal point for consideration.

overthrow our Government by violence. It is only this resort to the concepts utilized by autocracy and tyranny, that the nature of petitioners' activities can be said to indicate any danger at any time of an attempt at revolution by violence. If the principles upon which the First Amendment rests are applied to petitioners' activities all of which, no matter how unpopular, fall within the area of lawful political activity, then the record establishes affirmatively petitioners' innnocence rather than the required proof of guilt beyond a reasonable doubt.

E. The error of the courts below in dealing with the danger problem undermines the judicial process and abandons the basic precepts of the First Amendment. The failure of the courts below to perform the judicial function of determining whether danger of unlawful action existed, led directly to convictions for speech alone.

The convictions were sustained on the theory that freedom of speech, press and assembly may constitutionally be suppressed whenever a court deems "international relations" to be strained. If the views below be accepted, the "clear and probable danger" doctrine as enunciated by this Court in *Dennis* will be equated solely with "world conditions," in total disregard of any realistic danger that speech will ignite unlawful action. The exercise of freedom of speech, press and assembly will flow or ebb in proportion to the tide of "international relations." Moreover, the exercise of such rights will become entirely dependent upon the prophecy of judges as to future "world conditions." Our institutions are truly endangered if individuals may be imprisoned, not for anything they say or do which is unlawful, but principally because in the opinion of government officials, future "world conditions" seem to render it wise that speech be suppressed. It is

unreasonable to assume that Congress intended, or could reasonably have concluded, that the Smith Act should be applied to persons who never agreed to advocate in language of incitement to action and who had no power to bring about an attempted forcible overthrow of the Government. Moreover, here, not even a conspiracy to engage in the proscribed advocacy was proven at the trial. The only danger to the nation revealed by the record in this case lies in the standards under the Constitution fixed by the courts below in applying the Smith Act to these petitioners.

V.

The Construction of the Word "Organize" by the Courts Below Was Contrary to Law and the Constitution.

A. As petitioners noted in the Statement of the Case (*supra*, pp. 7-12), the indictment here is unique among all Smith Act indictments because it is the only one which charges that a conspiracy was formed "on or about June 28, 1940" to organize the Communist Party for the purpose of advocating and teaching the forcible overthrow of the Government [Clk. R. 1]. In *Dennis*, and indeed in every other Smith Act prosecution, the stress of respondent has been on the charge that the conspiracy to organize the Communist Party was launched in April 1945. This Court in *Dennis* emphasized the importance of the "1945 conspiracy." "Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to

achieve national unity and peace and prosperity in the postwar period" (341 U. S. 494, 498, n. 1). This Court predicated its decision in *Dennis* in a finding that the defendants "By virtue of their control over the political apparatus of the Communist Political Association . . . were able to transform that organization into the Communist Party" in 1945, for the alleged unlawful purposes there set forth.

The indictment in *Dennis* was returned on July 20, 1948 (80 F. Supp. 479, 481). It charged that the conspiracy to organize the Party was formed on or about April, 1945. At the trial, respondent took the position that the Party had been organized on July 28, 1945 [Clk. R. 25-31] and at that time the charged conspiracy of April, 1945, to organize the Party for alleged unlawful purposes was achieved [Clk. R. 9-14]. The prosecution thus was initiated within the three year period of the statute of limitations, measuring the period from the date of organization on July 28, 1945, to the return of the indictment on July 20, 1948.

In this case respondent, abandoning the "1945 conspiracy" theory of its original indictments (*supra*, pp. 7-12), for the first time charged that the conspiracy to organize was formed on June 28, 1940. All efforts prior to trial to ascertain respondent's theory as to when the Communist Party was organized were frustrated by the rulings of the trial court [Clk. R. 6-14, 25-32, 61-2]. At the trial, the respondent, while insisting that the conspiracy charged in the *Dennis* case was identical with the conspiracy charged in the indictment here "excepting in point of time" [R. 1407], proved, as in *Dennis*, that the Communist Party had been dissolved in 1944, the Communist Political Association was then formed, and this was

followed by the dissolution of the Association and the organization of the Communist Party in New York in 1945. There was no proof of any conspiracy to organize the Party in 1940 as alleged in the indictment. The only occurrence on June 28, 1940 of any relevance here was the enactment of the Smith Act (June 28, 1940, c. 439, Title I, Sections 2, 3, 5, 54 Stat, 670, 671).

Respondent's shift in its theory may be explained by the following considerations. In the first place, it had no proof that any of *these petitioners* had any control over the political apparatus of the Association or the Party; it was unable to prove that any of them knew or understood that the organization of the Communist Party of the United States at the convention in New York in 1945 was for the purpose of advocating or teaching the overthrow of the Government by force and violence. In the second place, the respondent made no claim that these petitioners, apart from their relationship with the Communist Party, had conspired to advocate and teach the forcible overthrow of the Government. Like the prosecution in *Dennis,* respondent was compelled to rely on the portion of the charge in the indictment which dealt with organizing the Party for the proscribed purpose. But, unlike *Dennis,* the statute of limitations had obviously run here on the prosecution for organizing the Party in 1945. Therefore, the respondent, in flat contradiction of its position in *Dennis,* maintained here that the Party was not "organized" in July, 1945; that under the Smith Act, any activity within the Party or in its behalf, no matter how minor or innocuous, was "helping to organize" the Party; that a conspiracy to so organize the Party was a continuous one and indeed could never be achieved, but would continue until the Party became extinct.

The trial court fully accepted respondent's theory on this issue. The court instructed the jury:

> "The verb 'organize,' as used in the Smith Act and the indictment, includes the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" [Inst. 13, R. 13,756 App. Item 2(g), p. 37].[133]

The question presented here is whether this construction of the statute was correct. The ensuing discussion is intended to demonstrate that such an interpretation of the Smith Act is not only unwarranted in law, but if permitted to stand, raises serious constitutional issues which this Court ordinarily will avoid when a more appropriate and accurately precise construction of the law is available.

B. The question as to the meaning of the word "organize" did not arise in *Dennis* for the reasons aforestated. The question appears neither to have been raised nor considered on appeal in *Frankfeld v. United States*, 198 F. 2d 679 (C.A. 4, 1952). In *Flynn v. United States*, 216 F. 2d 354, 358 (C.A. 2, 1954), the construction of

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[133]In objecting to this instruction, petitioners requested the trial court to instruct the jury as follows: "To 'organize' means 'to furnish with organs, to give an organic structure to.' To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size" (Prop. Inst. 34, App. Item 2(g), pp. 37-8). Motions to dismiss the indictment [Clk. R. 6, 7] and for judgments of acquittal [Clk. R. 64, 71] upon the grounds that the prosecution was barred by the statute of limitations were made and denied [Clk. R. 61, 100]. The Court of Appeals affirmed all of the rulings of the trial court on this issue [Clk. R. 118-9]. The Court held that even if it be assumed "that the crime of organizing had been complete" [Clk. R. 119], still the charge of conspiracy to advocate and teach remained. We discuss this issue later in this Point.

the statute was directly contrary to the construction here, and the portion of the indictment which charged a conspiracy to organize was held barred by the statute of limitations, Judge Dimock instructing the jury: "The Communist Party was organized back in 1945. Under the Statute of Limitations a defendant cannot be found guilty of any crime committed more than 3 years before the filing of the indictment. The indictment in this case was filed June 20, 1951, so that no defendant can be convicted of conspiring to do anything that was completed before June 20, 1948, and that includes the organization of the Communist Party. Thus, even if you should find beyond a reasonable doubt that a defendant, who had not conspired to teach, had conspired to organize a group to teach, you could not find him guilty because the act of organization of the Communist Party was, as we say, prior to the period of the Statute of Limitations." (*United States v. Flynn*, unreported (S.D. N.Y., 1953; C. 137-7). A similar instruction was given by the trial court in *United States v. Mesarosh*, 223 F. 2d 449. 465 (C.A. 3, 1955). These rulings in Smith Act prosecutions appear consistent with law and the purpose of the statute, as we now demonstrate.

C. If legislative purpose and intent be first considered, it is plain that the construction of the statutes by the courts below was erroneous. The history of the Smith Act and its phraseology indicate that the word "organize" is used in the ordinary sense. There was no discussion in Congress during the pendency of the measure as to the meaning of the term. Apparently it was assumed that the meaning of the word "organize" was obvious and settled. When Congress used a term in any special sense in the Smith Act, a special definition was inserted in the

Act. See the definition of "Government of the United States," 54 Stat. 670, Title I, Section 2(b).

In *Dennis*, Justice Jackson noted (341 U. S. 494, 562, n. 2) that the initial criminal anarchy statutes of 1909 were the prototypes of the criminal syndicalism statutes of 1917-19, essentially the same in language, and that these state statutes served as a model for the Smith Act. See, Chafee, *Free Speech in the United States* (1941), pp. 143, 163, 165.

The language of the California Criminal Syndicalism Act and of the Smith Act are strikingly similar. *Cf.*, Deering's General Laws, Act 8428, Section 2(4) and 18 U. S. C., Section 2385, par. 3. The California decisions interpreting the language of the Criminal Syndicalism statutes in 1923 and 1924 indicate a settled construction of the provisions of those statutes for almost two decades with which Congress was presumably familiar when it adopted similar language in the Smith Act. Thus, in *People v. Thornton*, 63 Cal. App. 724, 219 Pac. 1020 (1923), the indictment charged that defendant, among other things, "did then and there willfully, unlawfully, knowingly, and feloniously organize and assist in organizing said organization known and designated as the 'Industrial Workers of the World,' . . . which said organization . . . was then and there organized to advocate, teach, aid, and abet the commission of criminal syndicalism as a means of accomplishing . . . political changes in the government of the United States." The evidence showed that the defendant had recruited a member into the organization. The Court held that the evidence was insufficient to justify a conviction of defendant "of the crime of willfully or at all organizing or assisting in organizing the said I. W. W." (p. 726). "The society

was completely organized and in existence at and prior to that time" (p. 726). In *People v. Thurman*, 62 Cal. App. 147, 216 Pac. 394 (1923), the information again included a charge of "organizing and assisting in organizing" the I. W. W. The Court in that case held that neither the circulation nor distribution of the literature of the I. W. W. nor recruitment, if there had been any, of members constituted "organizing or assisting in organizing" under the law (p. 151). The Court held that the word "organize" as contained in the statute and as used in common parlance had no doubtful or ambiguous meaning. "To organize is a very different thing from extending the limits of the organization or adding to or increasing its size" (p. 151). "To organize means 'to form with suitable organs'" (p. 151). In *People v. Ware*, 67 Cal. App. 81, 226 Pac. 956 (1924), the words "organize and assist in organizing" were for a third time held not to include the recruitment of new members. "That society (I. W. W.) was completely organized and in existence before appellants had anything to do with it. And the act of bringing in or assisting to bring in members is not the equivalent of 'organizing or assisting in organizing' such a group of persons" (p. 84).

Ordinarily it will be presumed that a legislature which adopts the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording. Such a presumption of legislative intention is especially strong where the similarity in language is marked, where the character of the decisions in the jurisdictions from which the language was adopted is well established, and there is no evidence to indicate a contrary intention. *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, 304-8; *James v. Appel*,

192 U. S. 129, 135; *Joines v. Patterson*, 274 U. S. 544, 549.

D. In the absence of some contrary indication, courts must assume that the framers of the statute intended to convey the ordinary meaning which is attached to the language they used. *Jones v. Liberty Glass Co.*, 332 U. S. 524, 531; *Rosenman v. United States*, 323 U. S. 658, 661. "As a general rule words do not acquire a peculiar and different meaning when used in a statute. Ordinarily they are to be given their usual, natural, plain, ordinary, and commonly understood meaning, and strict grammatical usage will not necessarily control over the general and popular usage of the words." 82 C. J. S., "Statutes," Sec. 329(b), p. 629. "For the purpose of either limiting or extending the operation of the statute, the words therein are not to be given a forced, strained, subtle or unusual meaning." 82 C. J. S., *supra*, p. 649. See also *Lindstrom v. Commissioner*, 149 F. 2d 344, 346 (C.A. 9, 1945); *Cliffs Corp. v. United States*, 103 F. 2d 77, 80 (C.A. 6, 1939).

The meaning commonly attributed to the word "organize" is to bring an organization into existence and to furnish it with organs so that it is endowed with capacity to exercise its appropriate functions. Indeed, it is usually defined by excluding any notion that the word "organize" comprises extension of the limits of the organization or adding to or increasing its size. The commonly accepted definition is pervasive in cases involving unincorporated as well as incorporated associations.

Thus, in *People v. Thurman*, *supra*, the Court stated: "Such increase of membership would not alone have sufficed to furnish the body of men known as the Industrial

Workers of the World with organs—a president, secretary, treasurer, etc.—whereby it would be endowed with the capacity to function—particuarly if it were already endowed with such functioning organ or media through which its purposes might be accomplished and its acts performed" (p. 153). In *People v. Thornton, supra,* the Court held that "to organize is a very different thing from extending the limits of the organization or adding to or increasing its size" (p. 727). In *State ex rel. Childs v. School District,* 54 Minn. 213, 55 N. W. 1122 (1893), the Court stated (p. 215): "The words 'establish,' 'create,' 'form,' and 'organize' are evidently used interchangeably, and as practically synonymous. The word 'organization' is clearly used in the sense of formation, and includes everything necessary to the creation of the district, or bringing it into being." In *Whitmire v. Cass,* 213 S. C. 230, 236, 49 S. E. 2d 1 (1948), the Court stated: "The word 'organize' in some of its forms is frequently used in the Constitution and laws of the state, and as so used has no doubtful or ambiguous meaning. To organize a certain territory into a municipal corporation is a very different thing from that of extending the limits of an incorporated city over new territory." Similar language is contained in *Warren v. Barber Asphalt Pav. Co.,* 115 Mo. 572, 22 S. W. 490, 491 (1893). In *Commonwealth v. Mann Co.,* 150 Pa. 64, 70, 24 Atl. 601 (1892), a corporation was held to be "organized when these officers have been appointed and taken upon themselves the burden of their offices; it is then furnished with organs; endowed with the capacity for the functions of life: Webster; qualified for the exercise of its appropriate functions: A. & E. Ency. of Law." Webster's New International Dictionary (2d Ed.) defines the word "organize" as

follows: "1. To furnish with organs; to give an organic structure to. See Organized. 2. To arrange or constitute in interdependent parts, each having a special function, act, office, or relation with respect to the whole; to systematize; to get into working order; as, to *organize* an army; to *organize* recruits." Black's Law Dictionary (3rd Ed., 1944) defines the term in this manner: "To establish or furnish with organs; to systematize; to put into working order; to arrange in order for the normal exercise of its appropriate functions."

The definition given by the trial court is clearly not the ordinarily accepted meaning of the word "organize." It is a strained and artificial definition which ascribes to the word organize the inclusion of such meanings as "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, group or other organization." If Congress had intended to give such special meaning to the words, it would have done so. The very omission to give such definition, and the complete absence of legislative discussion with respect thereto, is cogent evidence that Congress expected the word "organize" to have its ordinary accepted meaning. "If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition." *N. L. R. B. v. Highland Park Mfg. Co.*, 341 U. S. 322, 324-5. "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation . . . When the language is plain, we have no right to insert words and phrases, so as to incorporate in

the statute a new and distinct provision." *United States v. Temple*, 105 U. S. 97, 99.

E. The Smith Act is a criminal statute and must be strictly construed. That means that no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses. *United States v. Resnick*, 299 U. S. 207, 209; *United States v. Halseth*, 342 U. S. 277, 280. "Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used." 50 Am. Jur., "Statutes," Sec. 409, p. 433; Sutherland, Statutes and Statutory Construction (3rd Ed., 1943), Secs. 5604-5.

The construction of the statute by the courts below was neither a strict nor fair construction of the language used in the Act. Under the court definition, a jury could arbitrarily find a person guilty of the substantive offense of "organizing or helping to organize" a proscribed organization (10 years imprisonment), or, conspiring to commit such offense (five years) merely upon a showing that a decade after the formation and creation of the organization, such a person brought a single member into the organization, or suggested that a club of three members be abandoned, or merged with another club of two members. Since the trial court did not purport to give an all inclusive or limited definition, the jury was left free to speculate that almost any innocuous activity was "helping to organize, or to organize" the Communist Party of the United States of America. In complete disregard of the internal structure of the statute, a jury could find that one who joined a proscribed organization, as well as one who recruited a member, was "helping to

organize" the organization, although Congress made the act of joining or affiliating with unlawful knowledge a separate offense. 18 U. S. C., Section 2385, par. 3. Indeed, under the trial court's unduly extended construction of this penal law, virtually every separate provision of the statute would be encompassed under the words "organize or help to organize." Such a construction was neither "strict" nor "fair" nor "clear." What the courts below did here was to create a new offense under the guise of construing the statute. "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States,* 272 U. S. 620, 629.

F. Once the construction given by the courts below is accepted, grave questions of the constitutionality of the statute are raised. If "organize" means something other than to bring into existence; if it "includes," but is not limited to, "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other 'units,'" then the provisions of the law become so vague and indefinite, as to fail to give fair notice of what acts will be punished. The trial judge instructed the jury that the verb "organize" *included* the recruitment of new members, the forming of new units, etc., but he gave no indication to the jury as to the limits of the definition. Under such limitless and boundless definition, the jury was left free to speculate that virtually any passive or active relationship with the Party was an act of "organizing" or "helping to organize" the Party. The law, as so construed, provides no ascertainable standards of conduct and petitioners' rights under procedural due process were violated. "Legislation may run afoul of the Due Process Clause because it fails to

give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U. S. 95, 97. See also, *United States v. Cardiff*, 344 U. S. 174, 176. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

Moreover, and most importantly, the construction of the statute by the courts below raises serious questions involving First Amendment rights. Under that construction, virtually any exercise of freedom of speech, press or assembly by a member of the Communist Party could be deemed an act of "organizing" or "helping to organize" the Communist Party of the United States. Even the recruitment of a single member into the Party solely for the purpose of fighting for the Bill of Rights, to extend democracy or to oppose discrimination would come within the interdiction of the statute. This Court has held on numerous occasions that a statute which sweeps within its ambit activities which constitute an exercise of freedom of speech, press or assembly cannot be sustained; that such a statute hangs as a threat to free speech and permits the punishment of the use of such speech; that by its very existence such a statute exists as a pervasive censor and is incompatible with the First Amendment. *Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. Cali-*

fornia, 310 U. S. 106; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Winters v. New York*, 333 U. S. 507; *Burstyn, Inc. v. Wilson*, 343 U. S. 495.

It is fundamental that if a statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is the plain duty of the courts to adopt that construction which will save the statute from constitutional infirmity. *United States v. C. I. O.*, 335 U. S. 106, 121. Such a duty is especially manifest when the plain intent of Congress in the adoption of the provisions of the statutes is that the words contained therein should be given their ordinary and accepted meaning, a construction which at the same time avoids serious legal and constitutional questions.

G. The rulings of the courts below were manifestly harmful to petitioners. In the first place, by asserting that the conspiracy to organize the Communist Party was formed on or about June 28, 1940, respondent on this theory, adopted by the trial court, was able to introdute into evidence a vast conglomeration of hearsay evidence as the declarations of "co-conspirators" made during the existence of the alleged "1940 conspiracy" (Cert. App. B, pp. 106-122). Statements made by individual petitioners, or in their preser.e, but not in the presence of others after 1940 were admitted generally against all petitioners on the theory that they were the statements of co-conspirators made during the course of the 1940 conspiracy and binding on all petitioners (Cert. App. B,

p. 108). Thus, considerable oral and documentary hearsay evidence was admitted involving the period between 1940 and 1945 which would have been inadmissible if the alleged conspiracy to organize was treated as having been formed in 1945. See, *Kotteakos v. United States*, 328 U. S. 750, 765.

In the second place, if the courts below erred in their construction of the word "organize," so much of the prosecution as charged a conspiracy to organize the Communist Party of the United States of America was barred by the statute of limitations. The respondent will undoubtedly concede that if petitioners are correct in their definition, the Communist Party of the United States of America was organized more than three years prior to the return of the indictment herein. Since under the general verdict, the jury may have convicted petitioners for conspiring to "organize," even if they found no conspiracy to "advocate and teach," the prejudice resulting from the trial court's error requires reversal. *Yiswick v. United States*, 329 U. S. 211, 215-20. See also *Stromberg v. California*, 283 U. S. 359, 369-70; *Williams v. North Carolina*, 317 U. S. 287, 292; *Cramer v. United States*, 325 U. S. 1, 36, n. 45.

Finally, since there was no proof of a conspiracy to advocate and teach the forcible overthrow of the Government, and since the alleged conspiracy to organize the Communist Party for such purpose, even assuming the existence of evidence in support thereof, was barred by the statute of limitations, the motions for judgments of acquittal made on behalf of each of the petitioners should have been granted.

VI.

Refusals to Grant Motions for Mistrial Upon Publication of the "F.B.I. Report," and to Grant Motions for Continuance Upon Publication of "the Philbrick Story," Deprived Petitioners of a Fair and Impartial Trial and Their Liberties Without Due Process of Law.

A. The Director of the Federal Bureau of Investigation, a nationally prominent figure highly placed in the Department of Justice, knowingly and intentionally delivered a report for public consumption which purported to determine the very issues which the jury in this case was about to consider (*supra*, pp. 107-111). These issues, it should be noted, were drawn between the parties as the result of a prosecution initiated and pursued by the Department of Justice.[184]

Whether the "principles of Marxism-Leninism," referred to in the Constitution of the Communist Party, espoused the teaching and advocacy of the overthrow of the Government by force and violence was a basic question in the trial of the case, made so particularly by respondent's "inference upon inference" theory. The trial court constantly admitted Marxist-Leninist writings and other evidence offered by respondent upon the ground

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[184]The Department of Justice is an agency in the executive department of government headed by the Attorney General. 5 U. S. C., Section 291. The Attorney General supervises all litigation to which the United States is a party and directs all United States Attorneys in the discharge of their respective duties. 28 U. S. C., Section 507. He is authorized to appoint all officials for the detection and prosecution of crimes against the United States. 5 U. S. C., Section 300. The Federal Bureau of Investigation is a division of the Department of Justice, headed by a director, with powers delineated by law for the detection of crimes against the United States. 5 U. S. C., Section 340; 18 U. S. C., Section 3052; 18 U. S. C., Section 3107.

that it was relevant to the determination of "the nature and character and aims and objectives of the Communist Party" (106 F. Supp. 892, 900, Cert. App. B, pp. 102, 107; 106 F. Supp. 906, 937, Cert. App. B, pp. 128, 134). The jury was so instructed [Inst. 14-G, R. 13,762-63, App. Item 2(k), pp. 47-8]. All of the contentions made by respondent with respect to Marxist-Leninist writings, the aims and objectives of the Communist Party and the imputed inferences drawn therefrom were vigorously contested at the trial.

In this context, at the very eve of the submission of the issues to the jury, the Director of the Federal Bureau of Investigation issued the "Report." It will hardly be denied that the Director knew at the time that the trial herein was in progress, and indeed two members of the F.B.I. sat at respondent's counsel table throughout the trial. The Director had been asked by the Chairman of a Congressional committee for "documentary proof which I could cause to be published" (App. Item 78, p. 302). The Director replied in writing, acknowledging the Chairman's "interest in compiling for general distribution information reflecting documentary proof that the Communist Party in the United States is dedicated to the overthrow of the Government of the United States by force and violence" (*id.*, p. 302). The Director added that "there will be no objection to your committee issuing this compilation" (*id.*, p. 303). No request was made to forbear issuance of the Report until the conclusion of the trial.

Thus the issuance of the Report was intended for public information, and, as was to be expected, received the broadest press, television and radio coverage. No literate person, and indeed no member of this jury in

Los Angeles, could escape seeing, hearing or reading about the "highly confidential" and "long secret" report of the F.B.I.; or that the Director of the Federal Bureau of Investigation had "Documentary Proof that the Communist Party, U.S.A. Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence"; or that the Communists "try by means of cunningly phrased arguments and allegations to disavow their advocacy of overthrow of government by force and violence"; or that "the *principles, the laws,* of Marxism are universally applicable and essentially unchanged. The differences in application are only matters of *detail.* The question of force and violence is hardly a matter of *detail.*" See, Statement of the Case, *supra,* pp. 107-111, for other conclusions contained in the Report, and the Report (App. Item 78, pp. 301-6).

That the material issued was inflammatory and highly prejudicial was neither denied by respondent, nor the courts below. The trial court stated: "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial" (Cert. App. B, p. 143). The Court of Appeals stated: "With the trial court, we believe, to say the least the incidents were extremely regrettable in the public interest" [Clk. R. 134].

We have, therefore, a case where the prosecution in a criminal cause, undertook in a highly publicized "long secret" document, to discuss the merits of the case on trial with respect to some of the chief questions of fact in the trial, and to urge by alleged facts and argument that the issues could in their opinion be decided in only one way by the jury. There is no denial of the genuineness or the accuracy of the "Report," and it would ignore

reality to say that the jury did not read the publicity concerning the Report and its contents (*supra*, pp. 107-111). "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." *Meyer v. Cadwalader*, 49 Fed. 32, 36 (C.C. E.D. Pa., 1891).

The timing of the publications was calculated to secure the maximum prejudicial effect. It immediately followed the conclusion of petitioners' closing argument to the jury. Petitioners had already said their last word. Only the prosecution's final argument and the court's instructions remained prior to submission of the case to the jury. Not only was this last minute "evidence" presented without opportunity for cross-examination, but actually no means whatsoever were left to petitioners to attempt to offset the prejudicial impact of the "Report."

The question that remains is the validity of the refusal of the courts below to grant petitioners a mistrial after timely and appropriate motions had been made [R. 13,528, 13,535; Ex. NG, R. 13,647; Ex. NF, R. 13,645-47].

As a matter of policy in the administration of criminal justice, it has been held on particular occasions that prejudice must be conclusively presumed where irregularity has tainted the panel with obvious intimidation or coer-

cion. *Moore v. Dempsey*, 261 U. S. 86, 91; *Delaney v. United States*, 199 F. 2d 107, 112-14 (C.A. 1, 1952); *United States v. Marine*, 84 F. Supp. 785 (D.C. Del., 1949); *Meyer v. Cadwalader*, 49 Fed. 32 (C.C. E.D. Pa., 1891). Such a case is actually presented here, for the respondent, through one of its most prominent law-enforcement officials, deliberately communicated with the jury through the press, radio and television in lurid fashion and expressly avowed that some of the most significant evidence at the trial was capable of only one construction, that the Communist Party and its members could not be believed on their disavowal of force and violence, and that all of this was now revealed for the first time in a "long secret F.B.I. Report." It is impossible to assume that any juror affected by the attendant publicity which followed this Report could exclude from his mental processes in reaching his verdict the influence of this pervasive publicity engendered by the Director of the Federal Bureau of Investigation. Under such circumstances, it was impossible to assure the petitioners a fair trial before an impartial jury. See, *Shepherd v. Florida*, 341 U. S. 50, 51; Note, *Controlling Press and Radio Influence in Trials*, 63 Harv. L. Rev. 840 (1950). See also, *Maryland v. Baltimore Radio Show*, 338 U. S. 912; *Berger v. United States*, 295 U. S. 78, 88; *United States v. Rosenberg*, 200 F. 2d 666, 669-70 (C.A. 2, 1952); *Boyer v. United States*, 132 F. 2d 12, 13 (App. D.C., 1942); *Kirsch v. United States*, 174 F. 2d 595, 601 (C.A. 8, 1949); Barron, *Federal Practice and Procedure* (Rules Ed.), Vol. 4, p. 480.

At the very least, the communication of the Report and the publicity thereon, was presumptively prejudicial. "In a criminal case, any private communication, contact,

or tampering, *directly or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." *Remmer v. United States*, 347 U. S. 227, 229 (emphasis supplied). "Private communications, possibly prejudicial; between jurors and third persons, or witnesses, or the officers in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox v. United States*, 146 U. S. 140, 150. See also, *Wheaton v. United States*, 133 F. 2d 522 (C.A. 8, 1943); *Griffin v. United States*, 295 Fed. 437 (C.A. 3, 1924).

This Court stated in *Remmer* that when such communication to the jury is proved, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant" (*id.*, p. 229). No such hearing was granted to petitioners and no such burden was assumed by respondent. All that the trial court would agree to do in the premises was to propound a single compound question to the jury. "There will be only one question" [R. 13,714]. The compound inquiry merely sought answer as to whether the jury had read the publicity *and*, then, if "they feel they could not with an open mind decide this case solely upon the evidence adduced here as they are duty-bound and oath-bound to do, *and that is all. Then we take their word for it, whatever it is*" [R. 13,714] (emphasis supplied). It should be noted that a negative answer to this single compound question would not clearly indicate whether the jurors had not read the publicity, or whether having read it, they asserted that they would decide the case solely on the evidence, totally unaffected by the "Report." More-

over, the compound question did not purport to ascertain to what extent the publicity on the "F.B.I. Report" had influenced the minds of the jurors; it sought only an answer to the routine question as to whether the jurors believed they could disregard the impact of the "Report" and decide the case on the evidence as they were "duty-bound and oath-bound to do." The single compound question was so phrased that an affirmative answer virtually required an admission by the juror that he would violate his sworn duty. The question was designed to gloss over the incident, not to ferret out what prejudice might result to petitioners therefrom. Not only did the trial court reject any searching interrogation or hearing when the motions were made, but after verdict it ordered no inquiry or interrogation whatever of any juror by anyone under threat of contempt, thus closing the door before and after the verdict to any ascertainment of the effect of the communication upon the jury.

In *Remmer*, this Court stated: "A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. . . . The trial court . . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate" (*id.*, pp. 229-30). Here the very opposite was done. No hearing of any kind was granted. It is submitted that the trial court thus committed serious prejudicial error and deprived petitioners of a fair and impartial trial without due process of law.

Even when jurors have upon proper examination stated in their opinion that a communication did not influence their verdict, that is not an end of the matter. "All persons are influenced in some way in arriving at deci-

sions and it is difficult, if not impossible, to know just what particular fact or event influences one in arriving at a conclusion." *United States v. Rakes,* 74 F. Supp. 645, 648 (D.C. E.D. Va., 1947). The duty of the trial judge is to permit a thorough and complete examination by all the interested parties. Much more is involved than even the opinion of the juror. Communications such as the ones which took place here imperil "the fairness of the trial" and tend "to undermine the confidence of the community and of the parties in the trial process. . . . A trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." *Ryan v. United States,* 191 F. 2d 779, 781 (App. D.C., 1951). All of these considerations would have played a part in the final determination of petitioners' motions for mistrial if the trial court had conducted the requisite hearing. Since this was not done, there was a plain abuse of judicial discretion and a deprivation of petitioners' rights to a fair trial.

B. The publication of "The Philbrick Story" just prior to the commencement of the trial, and during its early stages, did not consist merely of sensational news headlines. It was aimed directly at the petitioners here and the issues then about to be tried before the jury. Philbrick was described as one whose "electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious "Communist 11'" (Statement of the Case, *supra,* p. 106). The so-called "Communist 11" were named *in this indictment* as co-conspirators with petitioners. The publication announced that Philbrick's story would run in serial form and reveal "how the Communists intend

to overthrow the U. S. government and when." From January 20, 1952, through February 7, 1952, both preceding and following the commencement of the trial, the community from which the jury was selected read the testimony of a witness as if he were at the trial, testifying to "when the Reds will strike," "exposure of the Communist Plot," "Ruthless Underground Red Tactics," etc., etc. *(supra,* p. 106). Despite all this, the trial court refused to grant a continuance of the trial until 60 days after the conclusion of the publication of the "Philbrick Story" *(supra,* p. 107).

The trial court was charged with the duty of assuring the petitioners a fair trial, and the refusal to postpone the trial until by a reasonable lapse of time the danger of the prejudice created by these publications may have been substantially removed was clearly erroneous. If the prosecutor at the trial had told the jury that it had a witness who had been instrumental in the conviction of the "notorious 'Communist 11'," who would expose the "Communist Plot," and soon—and had then failed to produce such a witness for examination—undoubtedly a mistrial would have been granted. Here, the same effect was achieved through the newspapers, with petitioners deprived of the right to confront the witness and to cross-examine him. There was simply no way in which petitioners could dissipate the prejudicial harm caused by these publications. The only recourse consistent with fairness to petitioners was a reasonable continuance. *Delaney v. United States,* 199 F. 2d 107 (C.A. 1, 1952). Cf., *Shepherd v. Florida,* 341 U. S. 50.

In *Delaney, supra,* where reversal followed because of failure to grant a continuance under somewhat similar circumstances, the Court stated: "One cannot assume that

the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by a pervasive pre-trial publicity" (*id.*, pp. 112-3). The Court held that it was not enough that the usual cautionary instructions had been given to the jury. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U. S. 440, 453. "The danger presented by any publication is that whether or not true or reliable, it may improperly influence the honest and rational exercise of judgment by both the triers of fact and law, in the face of judicial procedure designed to protect that judgment. . . . In view of the traditional concern for protecting the rights of an accused in a criminal case, a particular publication would ordinarily be viewed as capable of more serious harm in that type of action than in a civil suit." Note, *Controlling Press and Radio Influence on Trials,* 63 Harv. L. Rev, 840, 841-2 (1950).

It is submitted that both in the failure to grant the requested continuance, and the motion for mistrial upon publication of the "F.B.I. Report," the trial court committed serious error which deprived petitioners of the fair trial guaranteed to them by the Constitution.

Conclusion.

The judgment of the court below should be reversed and the cause remanded to the District Court with directions to enter an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Respectfully submitted,

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APPENDIX.

Statutes and Constitutional Provisions Involved.

18 U. S. C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government:

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U. S. C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U. S. C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or pro-

priety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. . . ."

18 U. S. C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUBJECT INDEX

PAGE

I.

The evidence is insufficient 2

II.

The Smith Act as construed and applied in this case, with respect to the issue of incitement to action does violate the First Amendment 21

III.

The rulings on clear and present danger are contrary to the requirements of the First Amendment 25

IV.

The instructions of the trial judge with respect to the meaning of "organize" were erroneous and violated the constitutional rights of petitioners 29

V.

The commission of overt acts in furtherance of the conspiracy charge within the limitations period was not proved 32

VI.

Petitioners were deprived of a fair trial 36

VII.

Conclusion 42

TABLE OF AUTHORITIES CITED

CASES — PAGE

Fujimoto et al. v. United States, No. 13915, pp. 113-114, n. 4.... 19

Gitlow v. New York, 268 U. S. 652.....23, 24

United States v. Flynn, 216 F. 2d 354..... 41

United States v. Schneiderman, 320 U. S. 118..... 5

STATUTES

McCarran Act, Sec. 4(f).....3, 4, 5

United States Constitution, First Amendment.....17, 20, 22, 23, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 6.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

The object of this Reply Brief is to deal with the fundamental defects in the brief for the United States and to give a few examples of omissions or errors in the facts recited and argument advanced by respondent. No more is possible within the confines of a necessarily short reply brief. No more is necessary, it is respectfully submitted, for petitioners' position is otherwise fully stated in the Opening Brief on file herein.

I.

The Evidence Is Insufficient.

A. Petitioners' fundamental theory as to the sufficiency of the evidence can be summarized in three propositions:

1. Petitioners are *leaders* of the Communist Party on either a local, state or a national level with a long-time record of activity therein. They are not merely members and officers and therefore must be treated differently than individuals who are merely members and officers of the Communist Party (R. Br. p. 106).[1]

2. The Communist Party is an organization which is founded and which functions on the principles of Marxism-Leninism, which principles must be construed as advocating the overthrow of the government of the United States by force and violence (R. Br. p. 105).

3. By virtue of their long-time activity and leadership in the Communist Party, on whatever level, it must be inferred that petitioners (a) knew and understood that the "principles of Marxism-Leninism" mean the advocacy of the overthrow of the government of the United States by force and violence; (b) knew and understood that the Communist Party interpreted and applied the principles in the same way; (c) with such knowledge and understanding, petitioners became members and officers of the Party; (d) became part of a conspiracy within the organization to effectuate the aforesaid objective; and (e) had the specific intent to accomplish the overthrow of the government of the United States by force and violence as speedily as circumstances would permit.

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[1]The brief of the United States will be referred to herein as "R. Br." Petitioners' Opening Brief will be referred to as "P. Br."

Accordingly, the evidence introduced concerning the nature and character of the Communist Party can consist entirely of what individuals other than petitioners did and said in the Party and of the books and other documents circulated and used within the Party. Then, by the simple expedient of establishing that petitioners are long-time active leaders in a city or any other subdivision of the Communist Party, they can properly be found guilty of conspiring to advocate and teach the overthrow of the government of the United States by force and violence.[2] In addition, respondent argues that as to each of the petitioners there was sufficient evidence aside from evidence of "leadership" to permit the jury to find every essential ingredient of the offense charged in the indictment. We discuss, first, respondent's theory of inferred guilt from long-time membership and officership in the Communist Party. And then, second, respondent's view of the sufficiency of the record based on the so-called additional evidence. The untenable character of the latter position will perhaps explain why respondent relies so heavily on its first "theory."

B. As the following brief analysis will reveal, respondent's theory of imputed guilt is supported neither by the record, by the law, nor by common sense.

1. Although Section 4(f) of the McCarran Act is not mentioned in its Brief, respondent seeks to avoid the effect thereof by urging that petitioners are not *merely* members and officers of the Communist Party, but they are *leaders*. Respondent cannot avoid the consequences

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[2]On this theory, of course, every long-time active "leader" of any subdivision of the Communist Party can properly be found guilty of Smith Act violations by proving that Marxist-Leninist books are circulated and studied in the Communist Party.

of Section 4(f) by this semantic device. The reference in that section to officers of the Communist Party can reasonably be construed only as including those holding positions of leadership, *i.e.*, leaders of the Party. That section was designed to require proof of an individual's knowledge evidenced by his acts instead of permitting his mere connection with the Communist Party in any capacity to become the basis for drawing inferences of guilt.

Respondent asserts that it is not relying solely on the long-time membership and officership in the Communist Party of these petitioners (R. Br. pp. 105-6). Then the respondent proceeds to base every inference of guilt on such membership and officership. It is true that in this connection respondent refers also to its version of what the Communist Party advocates, but that adds nothing to the case against petitioners. It is petitioners' understanding and activities that are important, not what is contained in books or what others said or did outside of the presence and, so far as the record shows, any knowledge of the petitioners. Insofar as petitioners' activities and understanding are concerned, respondent's contention is that proof of long-time officership and membership (indicating leadership) is sufficient to support a verdict of guilt.

2. Even if petitioners could, as respondent contends, be held vicariously responsible because of evidence as to the nature and character of the Communist Party, respondent's thesis cannot be sustained. In discussing the nature and character of the Communist Party, respondent selects from the record only that evidence and those quotations which suit its purposes. In the ordinary case, it may be appropriate for the prosecutor on appeal to select clearly proved criminal conduct in support of the judgment of

conviction without regard to other evidence in the case. But where one essential element of a prosecutor's case is the accused's inferred knowledge and understanding of the principles, policies and program of an organization, there is no basis for assuming or inferring that petitioners had knowledge of certain writings or portions of writings circulated, or of certain things that were said within the organization, but not of others (for this purpose we assume, of course, that the drawing of any such inferences are not prohibited by Section 4(f) of the McCarran Act and by the constitutional inhibitions against the doctrine of guilt by association). In fact, the presumption of innocence to which petitioners, like all other defendants in criminal cases, are entitled would seem to require the inference of knowledge of the innocent rather than the evil character of the organization to which they belong if the evidence revealed the possibility that either conclusion could be drawn. The following are examples of uncontradicted facts in the record herein from which knowledge of the innocent character of the Communist Party might be inferred, which respondent completely disregards in its brief.

(a) Respondent refers to many passages written many years ago in other countries. It ignores other passages in the very same books declaring that the general principles of Marxism-Leninism may not be mechanically and universally applied but, on the contrary, they must be applied differently under the different conditions. Moreover, "political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written" (*United States v. Schneiderman,* 320 U. S. 118, 154). Respondent's theory foists upon petitioners without evidence a literal interpretation of each

of the passages selected by respondent and their application directly to the United States at the present time, without regard to the aforesaid admonitions contained in the very books upon which respondent relies. (See P. Br. pp. 26-28.)

(b) The record reveals that all of the writings relating to violence are susceptible of the interpretation that they relate either to the use of the legal force and violence (police force and army) of a legally constituted state once power has been achieved, or to the use of force and violence in those countries and places where no democratic processes exist and where the majority can achieve its will in no other fashion (P. Br. pp. 24-25). Respondent's position is that without proof its interpretation of Marxist-Leninist writings must be attributed to petitioners and the other possible interpretations must be ignored. This position is insisted upon by respondent despite the testimony of its own witnesses that the proper interpretation of Marxist-Leninist writings is a difficult thing, that persons all over the world both within and without the Communist Party have differed on the question of such correct interpretation; and despite the fact that some of such witnesses themselves construed Marxism-Leninism and the policies of the Communist Party as being opposed to the use of force and violence as a means of accomplishing the revolutionary change to socialism and as predicting its occurrence only because of the possibility that a minority might attempt by force and violence to prevent the majority from having their way (P. Br. pp. 148-151).

(c) Respondent cites its Appendix A for the proposition that the Communist Party tolerated no doctrinal deviation from its tenets, least of all from the doctrine of

force and violence (R. Br. p. 106). To reach its conclusion respondent relies on its interpretation of selected passages from books and on incidents of several expulsions of individuals from the Communist Party which individuals sought to advocate the establishment of socialism without regard to the winning of a majority desiring socialism.[3] Yet when discussing this point, respondent disregards all of the evidence showing disagreements, discussion and shifts of policy which its own witnesses testified were constantly going on within the Party (R. Br. p. 83, n. 56; p. 173).

Simultaneously with this reliance upon the expulsion of "leftists," as noted above, the respondent relies upon statements made by some of these leftists within Party clubs as proving the nature and character of the Communist Party and its binding effect upon the petitioners. Thus respondent places great stress upon the views expressed concerning the 1934 Waterfront Strike and its relationship to revolution at a meeting of the club from which the "leftists" were expelled (R. Br. p. 143); the members of which club openly stated that they disagreed

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[3]This technique of respondent is one of twisting of every item of the evidence in such a way as to present it in a manner most unfavorable to petitioners. Respondent never presumes innocence if a supposition of guilt is conceivable. Here the expulsions relied upon show an opposition to those who were unwilling to wait until a majority were won for socialism before advocating its establishment and who thereby indicated their desire to by-pass the democratic processes. Those who opposed the expelled "leftists" did so not because they believed that a violent revolution was premature, as respondent suggests, but because they believed, as the Communist Party Constitution provides, that in a democracy, socialism can and should be achieved without violence by winning a majority for that objective (P. Br. pp. 42-43). In its brief respondent repeatedly refers to this evidence as proof of the tight control exercised by the Party over its members as part of a conspiracy to advocate the overthrow of the government by force and violence.

with the Party leadership (P. Br. p. 98). Thus at one and the same time petitioners' guilt is predicated in part on the expulsion of these leftists and in part on the views of the leftists who were later expelled. No more convenient device for a successful prosecution has ever been utilized. But it is wholly irrational to infer tht an organization advocates the overthrow of the government of the United States by force and violence because it will not accept members who advocate the establishment of socialism before a majority of the people have indicated a desire for such fundamental change.

(d) Respondent's summation of a group of outlines (R. Br. pp. 151-161) illustrates very well its selective method of analyzing the contents of writings. The following are examples of a few of the omissions: first, no reference is made by respondent to the statements in the outline supporting defense of "bourgeois democratic rights" as one of the principles of Marxism-Leninism, accompanied by the admonition that the struggle for democracy is essential for the establishment of socialism [Ex. 626, p. 13]; second, respondent refers to a portion of the outline dealing with socialism and which states in part "achieved through revolution" (R. Br. p. 155). The entire phrase from which these three words are extracted is "achieved through revolution—*i.e.,* a fundamental change in the class control of society." [Ex. 626, p. 24]; third, the summary completely omits the outline's quotations from the Constitution of the Communist Party stating that the aim of the Communist Party is "the establishment of socialism by the free choice of the American people" which language is followed immediately by the assertion that there is need for a Marxist-Leninist Party "capable of leading the working class and the ma-

jority of the people to the achievement of socialism. * * * role of Party in helping working class to see the need for socialism based on their own experience." This in turn is followed by a criticism of Browder because by his policies "the whole question of socialism is reduced to a mere abstraction" resulting in the abandoning of "the advocacy of socialism even in a purely educatioual sense"[4] [Ex. 626, p. 26]; fourth, in dealing with the meaning of Party discipline, respondent discusses the portion of the outline indicating that decisions once arrived at must be carried out, but not wtih that portion of the outline which states that the policy of strict discipline "presupposes criticism and contest of opinion within the Party. Least of all does it mean that discipline must be "blind" [Ex. 626, p. 29]; fifth, those portions of the outline dealing with the immediate program of the Communist Party and with the relationship of the program to the achievement of socialism is entirely overlooked. The outline states that the immediate object of the Communist Party is to "help the working class and the people as a whole to meet their urgent, immediate practical needs" which are listed as peace, democracy, jobs and security. The outline states that in fighting for these needs "favorable conditions are created for the masses of our people to recognize, on the basis of their own experience, the need for the eventual reorganizaton of society along so-

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[4]In this connection it should be noted that respondent's analysis of the outline goes into great detail with respect to references to selected writings of Marx, Lenin and Stalin. However, it simply disregards those portions of the outline which set forth the statements and position of the Communist Party of the United States. What is stressed by respondent is what Marx, Lenin and Stalin said; what is simply eliminated is what according to the outline the Communist Party said about how Marxism-Leninism should be applied to the United States.

cialist lines." All this is from a resolution of the National Committee of the Communist Party [Ex. 626, p. 34].[5]

(e) In discussing a second group of outlines, respondent concedes that they "contain statements purporting to repudiate the use of force and violence" (R. Br. pp. 161-164, 163) but belittles these statements on the grounds that the outlines were only *used* after the return of the indictment in the *Dennis* case and further asks the court to presume that the outlines were not *prepared* until after that time. These later outlines do indeed reject force and violence as a policy of the Communist Party and state that violence may occur where it is first used by a minority to prevent the expression of the democratic will of the people. Respondent assumes that these statements are inconsistent with the earlier outlines, but this assumption is based upon its own summation of those outlines which leaves out of the discussion that which is most important in them, *i.e.*, what the Communist Party said about its policies in the United States at the time that the outlines were written. When those statements are thrown into the scale, it appears clear that the later statements are merely a continuation of the expressions of policy calling for support of the democratic processes for the winning of the majority by education to socialism and for the establishment of socialism through the free will of the majority—all inconsistent with the advocacy of the overthrow of the government of the United States by force and violence.

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[5]Here again is an example of the total emphasis upon the writings of Marx, Lenin and Stalin, accompanied by the total disregard of the statements of the Communist Party of the United States.

The best that can be said for respondent's proof with respect to the alleged nature and character of the Communist Party is that from some of the excerpts in the Marxist books and writings distributed by it, some persons might conclude that these excerpts advocate a policy of overthrowing the government by force and violence. But at the same time other excerpts in the same books and writings and others distributed by it, including particularly the Constitution and Resolutions of the Communist Party of the United States, would lead other persons to conclude that the Party for the United States did not advocate the overthrow of the government by force and violence. Respondent's theory rests upon the assumption that the only possible conclusion from the evidence is that the Communist Party advocated the foreful overthrow of the government and that every person familiar with all of the writings and statements of the Party must have so understood. Otherwise even under its own theory the inference that petitioners because of their long-time activity and "leadership" in the Party must be assumed to have been part of the conspiracy charged is utterly without support. Thus one fatal defect in respondent's case is the failure to establish that the petitioners here adhered to that construction of Marxism-Leninism and that understanding of the nature and character of the Communist Party which respondent has adopted.

Moreover, the respondent's theory of imputed guilt rests, as petitioners demonstrated in their Opening Brief, upon an untenable and unlawful pyramid of illogical and baseless inferences (P. Br. pp. 146-158). Respondent has avoided any answer to petitioners' arguments on this issue.

C. Respondent asserts, however, that it does not rely exclusively upon the theory outlined above but that the record as to the petitioners contained independent evidence relating directly to each of them indicating their membership in the conspiracy. This conclusion arises out of the following fallacies, among others:

1. As to most of the petitioners an examination of respondent's summary of the evidence will reveal the complete absence of evidence of this kind.

2. With respect to the petitioner Schneiderman, respondent argues that the issue is whether the evidence shows that he was a knowing member of the alleged conspiracy between 1948 and 1951 and that what had happened a long time before then has no bearing on this issue (R. Br. p. 77). At the same time, respondent's case against all of the petitioners insofar as their individual conduct is concerned, and leaving to one side membership, officership and "leadership" in the Communist Party, rests virtually entirely upon evidence relating to periods falling outside of that covered by the indictment. As a matter of fact, there is only one incident relating to any petitioner falling within the statutory period which by any stretch of the imagination could be argued to have relationship to advocacy of force and violence. This is the incident involving petitioner Lambert in the City of Chico at the time when an F.B.I. agent was expelled on charges that among other things he was carrying a gun. Not only does respondent fail to answer the analysis of this incident contained in brief for petitioners (P. Br. pp. 72-77, 128-135) but by oversight it omits to mention that the significant part of the conversation, if indeed any part is significant, was admitted as to Lambert only and therefore cannot be relied upon to establish the conspiracy.

3. Here, too, respondent in analyzing the evidence selects those portions of the record favorable to its viewpoint and treats various incidents as though they were relatively clear and unequivocal although it appears from the testimony of its own witnesses that the opposite is true, or where there is clarity that it favors petitioners rather than respondent. The following are some examples: first, there are several instances in which the record reveals that some of petitioners taught Marxist-Leninist classes and in the course of such teachings referred to or used various Marxist-Leninist books. In none of these cases is there any evidence by respondent's witness, who in each case was present at the class, as to what any petitioner said during the class. All that the record shows is that certain books were used. Respondent then refers to certain selected passages from said books which it construes as advocating the overthrow of the government by force and violence, although there is evidence in the record that they can be construed in an opposite manner, and respondent then attributes the teaching of those passages thus construed to the petitioners teaching the classes involved. In each instance the respondent had a witness available who was present and knew what interpretation the petitioner teaching the class placed upon these writings and what if anything the petitioner said on the issues related to this case. It must be assumed that if any petitioner at any such class had said anything favorable to the government's case the witness would have so testified. The absence of such testimony is strong evidence that petitioners' conduct was innocent and not culpable, either because each petitioner construed the language involved differently than does the respondent or because each petitioner had chosen for discussion and emphasis passages other than those which re-

spondent has selected to include in its brief. Examples of this method of argumentation by respondent are: reference to testimony that petitioner Yates used Peter's Manual [Ex. 61-A] at a Party school in 1937 (R. Br. pp. 12-14);[6] the evidence that in 1945 Yates taught a class "in Marxism" without even indicating what books were used, let alone the passages therefrom. From this evidence respondent infers that petitioner Yates taught the entire subject of Marxism as construed by respondent upon the basis of passages it, not the petitioner, selects from various Marxist-Leninist writings (R. Br. p. 15). Respondent would draw similar inferences from evidence that petitioner Carlson on two occasions in 1946 taught "classes in Marxism" (R. Br. pp. 55-56). There is evidence of a speech by the petitioner Yates in which she spoke of Soviet forms of government and the necessity of the support of that form of government for Marxism to work. By inserting the word "Union" in brackets following the word Soviet, respondent converts the language into a meaning which it certainly does not have on its face (R. Br. p. 17).

Respondent directs attention to the fact that petitioner Yates together with petitioner Schneiderman prepared a study outline used in the "Marxist Institutes". [Ex. 163], but no attention is directed to the fact that this outline so prepared specifically states that the Communist Party is opposed to the use of force and violence in achieving

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[6]Incidentally, there is no evidence whatsoever that this book, Peter's Manual, was used at any time after 1937 either by petitioner Yates or any other person in the Communist Party. Yet on this kind of evidence that the book was used in a class three years before the Smith Act was adopted and ten years before the beginning of the running of the statute of limitations, respondent contends that connection with the conspiracy can be inferred.

socialism (R. Br. p. 19, Ex. 163, p. 8). This Government Exhibit, as respondent fails to note, is completely consistent with the testimony of petitioner Yates and there is no showing anywhere in the record that she ever said or did anything inconsistent therewith. In this connection it is important to note that respondent simply disregards Yates' own testimony and explanation of her understanding of Marxism-Leninism. Sole reliance is placed upon respondent's selection of material from Marxist-Leninist works and its construction of their meanings with no attempt to point out how, if at all, any of the evidence submitted on behalf of respondent contradicts to any extent petitioner Yates' interpretation of Marxism-Leninism.

Respondent refers to the evidence that at a Marxist class petitioner Spector assigned the book "Foundations of Leninism" for reading. It then follows its practice of quoting selected passages from that work as indicating what was taught by Spector on that occasion.[7] However, respondent forgets that the record shows that at the same time a book on the United Front was suggested for study and that this book, as distinguished from "Foundations of Leninism" refers directly to the United States and indicates that the road to socialist change as envisaged under Marxist-Leninist doctrine should be a peaceful one. (See R. Br. p. 31.) Thus even if respondent's method of attributing to a petitioner its interpretation of selected passages from books referred to by a petitioner in a class were otherwise defensible, at the very least consideration would have to be given to all of the books

[7]On this occasion too, as in others noted above, the witness was present during the class but gave not a single word of testimony as to what Spector said during the class.

assigned. And in a case such as this, where one book deals with general principles of Marxism-Leninism and another with a specific program for the United States, the only reasonable inference is that the specific program for the United States indicates what is believed to be the correct application of Marxism-Leninism to the United States.

Much emphasis is placed throughout the brief upon evidence of secrecy in the conduct of Communist Party meetings. Simply disregarded is the great volume of evidence indicating that such secrecy was necessary in order to protect members of the Communist Party against harassment, illegal interference, loss of jobs and actual acts of violence. Respondent would simply assume an evil motive for the secrecy, thus maintaining its consistency in disregarding the presumption of innocence and substituting on each issue of fact an assumption of guilt.

In dealing with the witness Estrada and his testimony that petitioner Carlson talked about Communist help to Negroes subjected to violent acts in the South, respondent disregards the fact that, after production of the F.B.I. reports involved, this witness was forced to admit that when Carlson talked about defense against fascist acts of violence Estrada interpreted it in his testimony as dealing with violent revolution. (See R. Br. p. 57, fn.)

An examination of the brief for petitioners will reveal that omissions of the kind last noted occur in virtually every incident relating to any petitioner dealt with in respondent's brief. Nevertheless, respondent asserts in its brief (p. 104) that petitioners committed many errors of omission in their brief, without specifying a single such omission.

4. Respondent contends that in discussing the sufficiency of the evidence petitioners raise issues of credibility of witnesses which was for the jury alone (R. Br. p. 104). This is not so. What petitioners urge is that the evidence lacked the solidity necessary to sustain a conviction in a prosecution invoking the First Amendment. What petitioners urge is that this prosecution, unlike the ordinary criminal case, involves First Amendment rights, and, as this Court has indicated, requires proof of personal guilt by "clear, convincing and unequivocal evidence" (P. Br. pp. 124-126). Not every fantastic tale of an informer, no matter how incredible and no matter how internally inconsistent and no matter how irreconcilable with other facts in the record or with a minimum level of common sense, is substantial enough to warrant the sustaining of a conviction where First Amendment rights are involved. One of several examples is the so-called Mother Bloor meeting discussed at page 35 and other places in respondent's brief. The nature of the testimony is indicated by respondent's own confusion with respect to it, for respondent refers to a "select group of Party officials" who attended this meeting. And in large part this is the effect that the witness' testimony was designed to have. However, the witness *who herself attended the meeting* had joined the Party only a few months before attending the meeting, held no office whatsoever in the Party, and would be the last person to be included in a "select group of Party officials." Moreover, the witness admitted that present at this meeting (which was announced by a printed invitation—one of which the witness received but failed to turn over to the F.B.I.) were non-Party members, and it is undenied that some persons who just casually dropped in were there. The witness' recitation of the speech given by Mother Bloor is as incon-

sistent as her testimony concerning the nature of the persons in attendance. As a reading of the testimony will show, it is inconceivable that a sane person could at one and the same time have said the absolutely irreconcilable things which Mother Bloor is reported to have said by the witness Van Dorn. Only by selecting part of the witness' testimony and disregarding the rest does it even begin to make sense. It is petitioners' position that the testimony of this witness must be considered in its entirety and the testimony that is virtually irrational lacks the solidity necessary to support a conviction in this case (P. Br. pp. 32-36; 141-143).

Moreover, there was uncontradicted proof in this record that the informers upon whom respondent relied were unmitigated prevaricators. The case here contains many instances where the informer witnesses either admitted they had perjured themselves or were proven to be testifying falsely as a matter of record.[7a] Respondent's case,

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[7a] Lautner stated that petitioner Richmond attended a convention of the Communist Party in 1945 [R. 1509]. Richmond was in the armed forces until March 6, 1946, and discharge papers show that Richmond while in the service was overseas in the European theatre [R. 2511]; Scarletto testified that in 1946 he had suffered from an injury sustained in the service [R. 3095] and had suffered with such injury until the time of the trial [R. 3096]. In an application for an insurance policy in 1948, he stated that he had had no previous injuries or consulted any physician [R. 3101-3102]; Scarletto testified that his first registration for voting was in 1942 [R. 3247]. In 1948, he registered again for voting and stated that he was registering for the first time [R. 3248-3250]; Scarletto stated that he saw petitioner Kusnitz at a meeting of the Los Angeles Committee for Protection of Foreign Born in September 1951 [R. 3317]. Government stipulated that petitioner Kusnitz was in jail because of inability to raise bail from July 26, 1951 to December 8, 1951 [R. 3319]; Van Dorn stated that she brought petitioner Dobbs up in the elevator many times during the latter part of 1944 and the year 1943 [R. 7983-4]. Dobbs was inducted into army on April 1, 1942, was shipped overseas on February 5, 1945 and returned to the United States on February 26, 1946

therefore, suffers not only from the failure to prove each of the petitioner's alleged guilt by "clear, convincing and unequivocal" proof, but it suffers from the additional infirmity that whatever evidence was adduced came from the lips of informers, obviously untrustworthy and unbelievable. These witnesses exemplified the tainted character of all informers, and the danger to the administration of justice of relying upon their testimony in any degree, particularly without scrutinizing the testimony with the utmost care (P. Br. pp. 129-135). Because of such danger, petitioners carefully analyzed each item of in-

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[R. 7986]; Estrada testified that he received no money from F.B.I. (other than expense money to come and testify) [R. 7253]. Government stipulated that Estrada received in 1947 the sum of $144.50 in connection with his services in reporting to F.B.I. [Ex. NA, R. 12,156, 12,155-62]; Evans received $4,086.68 as compensation for his services as an informer. He reported none of these earnings on his income tax returns (Pet. Br. p. 89); Wereb received $3,254.00 as payment from F.B.I. [Ex. NA, R. 12,155-62], but he did not include this money in income tax returns [R. 4020]; Scarletto identified Rev. Turner at the trial as Walter Martin who allegedly spoke at some meeting where Steinberg was present [R. 3288-89]; Wereb identified Lambert as Lima [R. 3949-50]; Rosser identified attorney Margolis as attorney Wirin [R. 5934-5] who had allegedly represented Rosser in some divorce proceedings; Estrada testified orally at trial concerning Carlson's statements about a "revolution in this country to overthrow the country by the Communist Party", but his contemporaneous written F.B.I. report showed that Carlson had referred to revolutionary action by Fascists and resistance to a fascist revolution. This, to Estrada, justified his testifying under oath that Carlson had called for a revolution by the Communist Party (P. Br. pp. 53-55); the witness Van Dorn testified that she had not given evidence before the grand jury which returned the indictment herein. In the subsequent Hawaii Smith Act trial, she testified that after the Los Angeles trial ended, she spoke to the trial judge, District Judge Mathes, and told him that she had not testified truthfully; that in fact she had been a grand jury witness prior to the trial in this case in Los Angeles. The Government in the Hawaii trial stipulated that Judge Mathes would testify that Van Dorn had never spoken to him after the Los Angeles trial nor had she ever told the Judge at any time that her testimony was not correct. Joint Opening Brief for Appellants in *Fujimoto et al. v. United States*, No. 13915, pp. 113-4, n. 4 on file in United States Court of Appeals for the Ninth Circuit.

former testimony of any consequence and noted the internal contradictions, the inherent improbabilities and the equivocal character of each of them, thus establishing that they lacked the "solidity" necessary to sustain the convictions. Respondent has made no attempt to deal with these analyses of the evidence but has cast them to one side as bearing merely upon credibility. The argument that they create too flimsy a fabric to sustain convictions involving First Amendment rights remains wholly unanswered.

D. Respondent's position is that advocacy, the subject matter of which was clearly legal and within the area protected by the First Amendment, is nevertheless proof of guilt in this case. Attention is directed to the fact that petitioners as members of the Communist Party participated in advocacy which raised grievances against the Government of the United States. These grievances, respondent argues, were advanced as the means of preconditioning people for violent revolution; accordingly, the advocacy of these grievances was a step in a conspiracy to overthrow the government by force and violence (R. Br. pp. 112-114). Long before the First Amendment was adopted this theory had been utilized as the grounds for suppressing all criticism of the Crown. It is an ancient device for suppressing dissent and destroying dissenters. It is precisely this invasion of freedom, among other things, that the First Amendment was designed to eliminate from our system of government. If speech which is innocent and which on its face is protected by the First Amendment may be punished because of the claimed intent of the speaker, the First Amendment can safely be relied on only by those who have no grievances to raise. Respondent thus inadvertently concedes what

petitioners contend the record has made clear all along—that the purpose and impact of these proceedings is to penalize these petitioners because they are members of an unpopular, small minority group, which over a long period of time has raised numerous grievances against the government of the United States.

II.

The Smith Act as Construed and Applied in This Case With Respect to the Issue of Incitement to Action Does Violate the First Amendment.

Respondent treats petitioners' argument as though their only complaint was that the trial court failed to use the word "incitement" in its instructions to the jury. To the contrary, the error complained of is that the instruction given to the jury in this case omitted all references to the necessity that the advocacy be directed to action. Not *once* did the trial judge mention the word "action" in his instructions; not *once* did he mention the right to advocate the abstract doctrine of forcible overthrow of the government. The distinction which the courts below drew, and which the respondent supports, is between the advocacy of forcible overthrow of government and the advocacy of non-forcible governmental change. But the jury was never told that the Smith Act, as construed by this Court in *Dennis*, does not punish all advocacy of forcible overthrow of government but only such advocacy when accompanied with a call for action directed towards that end. On this record, such an instruction to the jury would have required an acquittal. Instead, the jury were left free to convict upon the respondent's contention that the Marxist books, the Party and these petitioners at least advocated the abstract doctrine of forcible overthrow of the government.

Judge Medina partially defined the forbidden advocacy under the Smith Act as "the teaching and advocacy *of action* for the accomplishment of that purpose, by language *reasonably and ordinarily calculated* to incite persons *to such action.*" In this case the instruction given referred neither to advocacy of action nor to incitement to action. The whole concept that the speech must be directed toward the achievement of action is absent in the instructions that were given. Mere advocacy of the idea or concept of force and violence together with the requisite intent was under the trial court's instructions sufficient to sustain a conviction. That this is erroneous is virtually conceded by the respondent, although inadvertently. Thus it states (R. Br. p. 81) that the shade of meaning of the word "incite" which embodies "the idea of 'urging' the taking of some action, or 'moving to action by inducement or persuasion,' without any necessary implication as to when such action is meant to be or is urged to be taken" is correct. But the instruction as given made no reference to action at all and thus by respondent's own admitted standard it permitted an invasion of the First Amendment.

Respondent's argument that an instruction containing the word incitement might be misleading because it might lead the jury to believe that proof of advocacy of immediate action during the period covered by the indictment was essential for a conviction misses the beam. While respondent in all other sections of its brief seems to have clearly in mind the fact that the charge in this case is not present advocacy but rather a conspiracy to advocate in the future, in its argument with respect to the First Amendment respondent forgets this. What the First Amendment required, according to the *Dennis* case, was not proof that during the period of the indictment defen-

dants advocated force and violence in language of incitement to action; rather it was that during this period they agreed that at some time in the future they would engage in such advocacy. The instructions as given in this case permitted the jury to find the defendants guilty upon evidence that they agreed during the period of the indictment to advocate or urge in the future the idea that the Government of the United States should be overthrown by force and violence. It permitted such a conviction even though such planned advocacy and urging were to take place under conditions and circumstances where the defendants' ideas with respect to force and violence could still be answered by other ideas.

The gist of the crime charged here is that the defendants agreed that at some time in the future they would speak for the overthrow of the Government of the United States by force and violence under such circumstances and in such a manner that the language was calculated to instigate action, not merely to express an idea. All ideas, including the idea that the government should be overthrown by force and violence, fall within the protection of the First Amendment. It is only when words are used to induce action that the protection given by the First Amendment is lost. How immediately the precise action will follow the words is not the issue; rather it is whether the agreement is to use words calculated to proceed in an unbroken line to action without the intervention of further discussion. Because the instructions given failed to convey this concept, and not simply because the word "incitement" was not used, the statute as construed and applied ran counter to the First Amendment.

Respondent misconstrues the case of *Gitlow v. New York,* 268 U. S. 652 (R. Br. p. 84, fn.). It was not held

there that incitement was unnecessary; rather the court ruled that incitement "of certain persons" was not required. It was also held that the advocacy need not include "some definite or immediate act or acts." On the other hand, it was made equally clear that the speech had to be directed to action, the court saying: "It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of *action* for the accomplishment of that purpose." 268 U. S. at 665. (Emphasis added.) The Manifesto which was held illegal was described by the court in the following language: "It advocates and urges in fervent language *mass action* which shall progressively ferment industrial disturbances, and through political mass strikes and revolutionary *mass action* overthrow and destroy organized parliamentary government. It concludes with a call to action. * * *" Advocacy or urging, even of forcible overthrow of government, can be either part of a discussion or debate or it can be designated directly to induce the action without further discussion. It is this latter type of advocacy which is condemned in *Gitlow*. It is clarity on this point which was requested by petitioners and refused by the trial court. As a matter of fact, the court there stated that the language used on the basis of which the conviction was sustained "is the language of direct incitement." 268 U. S. at 665.

Respondent refers to the language of Mr. Chief Justice Vinson in the *Dennis* case that the Smith Act "is directed at advocacy, not discussion" (R. Br. p. 85). But immediately thereafter Judge Vinson notes that Judge Medina correctly instructed the jury that the statute was not aimed at "teaching and advocacy in the realm of ideas." (341 U. S. at p. 502.) It was this very distinction be-

tween teaching and advocacy in the realm of ideas and teaching and advocacy of action in language of incitement to action which Judge Medina made clear in his instruction and which was not set forth in the instructions given to the jury in this case.

III.

The Rulings on Clear and Present Danger Are Contrary to the Requirements of the First Amendment.

Respondent concedes: "It is possible that the trial judge did regard the jury's finding of the existence of this specific intent [to bring about the forcible overthrow of the government as speedily as circumstances would permit] on petitioners' part as sufficing, without more, to satisfy the 'clear and present danger' test." (R. Br. p. 87.) It is also conceded by respondent that such a finding of clear and present danger is deficient because it fails to take into account the objective conditions prevailing in the nation and the world during the relevant period. What is overlooked by respondent is that there are other objective elements in the clear and present danger test which require the trial judge's evaluation of the evidence presented, including the weighing of the credibility of the witnesses and the performance of those functions which initially must be undertaken on the trial level. Whether or not the petitioners had the power to bring about the evil and whether the nature of their activities was such as to constitute a "clear and present danger" were issues of fact, the determination of which depended upon the testimony before the trial judge. These issues he failed and refused to resolve. Even though such resolution may be part of the process of determining a "question of law"

it is intermixed with findings of fact necessitating an evaluation of the testimony at the trial level.[8]

In discussing the issue of whether or not petitioners had the power to bring about the evil, respondent misconstrues *Dennis*. The decision in that case was not predicated upon the proposition that the Communist Party had the power to initiate the action leading to an attempt at forceful overthrow of the government; rather it was found that collectively the petitioners there, by virtue of their control over the Communist Party, had that power. The group which was found to possess the necessary power in the *Dennis* case was the National Committee of the Party and the members thereof, the defendants in that case. Here, respondent argues: "If junior in rank to the *Dennis* petitioners, they nevertheless serve in the same army and were engaged in the same mission." (R. Br. p. 90.) But *Dennis* did not hold that all members of the Communist Party or all officers of the Communist Party merely by virtue of their membership or officership therein had the power to bring about the evil at which the statute is aimed. If the Communist Party be referred to as an army, then what *Dennis* was referring to was those who had command of the "army" and could determine its course of action. The defendants in the *Dennis* case, according to the finding upon which the Supreme Court acted, possessed such power of command and by virtue thereof had the power to bring about the evil. There is no evidence in this case that the petitioners individually, or collectively as the members of any group,

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[8]Of course, petitioners continue to urge their position that the evidence is patently insufficient to support a finding of "clear and present danger"; and that even if the trial court had examined the record and made a finding of "clear and present danger", it could not be sustained on appeal. (P. Br. pp. 271-273.)

had the power to set the Communist Party into motion toward the alleged illegal objective of the conspiracy. Moreover, there is no showing from their activities that petitioners were "engaged in the same mission" as were the defendants in *Dennis,* according to the findings upon which the Supreme Court in that case acted. If respondent's argument is accepted, it would appear that every member of the Communist Party from one holding no office of any kind whatsoever to the highest officers therein is "in the same army" and "engaged in the same mission" and therefore equally guilty with the defendants in *Dennis* of a conspiracy to violate the Smith Act, regardless of the individual's ability to move the Party in the direction of illegal action, even if he would, and regardless of the nature of his own activities within the Communist Party. In short, resondent's theory virtually outlaws the Communist Party and makes of every member thereof an indicted or unindicted conspirator. This, of course, is fully consistent with the approach taken by respondent in its argument that the evidence is sufficient to sustain the convictions. The problem which runs like a thread throughout every aspect of this case is whether it is individuals who are on trial in a Smith Act case or whether it is a trial of the Communist Party with a finding of its guilt automatically leading to a conviction of the defendants by virtue of their membership, officership and "leadership" in the Communist Party.

At the time of the trial in this case the existence of international conditions which the prosecution urges established a danger of an attempt at violent revolution greater than that which existed at the time when the *Dennis* case was tried (R. Br. pp. 71-72), created a basis for prophecy or prediction at best. But now it is not necessary to rely, at least to the same extent, upon such

uncertain methods for reaching a conclusion. Events have shown that the danger which many feared at that time has not matured, that peace has been established in the world, and that the prospects for peace in the future render remote the dangers which may have appeared so great in the past. A court deciding the issue of clear and present danger in 1951 had to work with the knowledge and tools then available. A court deciding that issue today should not limit itself if a better and more reliable basis for a decision is now available. Respondent argues, with respect to matters of which a court can take judicial notice, that this "international" element of the clear and present danger issue can be determined *de novo* in this case by this Court, both because it has not been determined by the trial court and because it deciding a question of law this Court should determine what the law is for itself. If that be so, then in making that determination this Court should no more rule out matters of which it can take judicial notice now bearing on that determination than it should ignore decisions which have been handed down since 1951. If this is done, then even if the question of the existence of a clear and present danger may be limited to the state of world affairs, no such danger can be found to actually have existed in 1951. Moreover, if the entire record is examined and all of the elements necessary to the finding of clear and present danger are evaluated, the lack of a clear and present danger from these petitioners in 1951 or at any other time demands a reversal of their convictions.

IV.

The Instructions of the Trial Judge With Respect to the Meaning of "Organize" Were Erroneous and Violated the Constitutional Rights of Petitioners.

Respondent urges that even if the instructions on the meaning of the word "organize" were erroneous and even though that portion of the charged conspiracy was barred by the statute of limitations, there is no prejudicial error because the jury was instructed that it could not find guilt unless it concluded that the petitioners had conspired to violate the Act both with respect to the conspiracy to engage in the illegal advocacy and in the illegal organization. In fact, the jury was never so specifically instructed. Moreover, this contention overlooks the essential aspects of the instructions. The jury was advised that in order to find that a defendant had become a member of the conspiracy, it was necessary for the evidence to establish "that the defendant willfully participated in the unlawful plan with specific intent to further the common purpose or design" [R. 13,745, App. Item 2(d), pp. 22-23]. Under this instruction participation in any aspect of the conspiracy charged and with respect to which the jury was instructed was sufficient to tie in any defendant to the conspiracy. Accordingly, if the jury believed that a defendant "willfully participated" in the "organize" aspect of the conspiracy as that was defined by the trial judge, that would be sufficient under the instructions to support a finding that the defendant was a member of the conspiracy. If, as petitioners contend, the "organize" instruction was erroneous, the prejudice flowing therefrom, is patent, particularly when the character of the evidence against individual petitioners is considered.

In addition, the jury was instructed that "any act committed by one of the conspirators to affect *an* object or accomplish *a* purpose of the conspiracy" constituted an overt act (emphasis added). One of the purposes of the conspiracy, as charged in the indictment, was to "organize" as therein alleged and, as far as the jury was concerned, to engage in that activity as it was defined by the trial judge in his instruction. Accordingly, the jury could well have found that the two overt acts concerning which there was some proof were committed to effect the "organize" object of the conspiracy, as that term was defined by the trial judge. Once again, prejudicial character of an erroneous instruction on this subject is patent, particularly in the light of the evidence concerning the two alleged overt acts set forth in the indictment concerning which there was some proof and in the further light of respondent's own argument that the said "overt acts" were sufficiently established because the two meetings involved constituted recruiting activities.[9]

In this connection it should also be recalled that the definition of the word "organize" given by the trial judge was not a limited one. He informed the jury that the word "includes" various activities such as recruiting, but he did not state what the outermost limits of the term were. Under his instruction any activity within the Communist Party could fall within the meaning of the word "organize." Under this broad and unlimited definition, the two public meetings of the Communist Party alleged to constitute the overt acts proved pursuant to the indictment could have been found by the jury to constitute overt acts simply by virtue of the fact that they were

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[9]Whether or not this is so will be discussed *infra* in the section of the Reply Brief dealing with the overt act aspect of the case.

activities of the Communist Party. Indeed, under this limitless definition of the word "organize," any defendant's connection with the conspiracy could be established by any activity of any kind as a member of the Communist Party. This is in complete harmony with the prosecution's theory that long-time membership and officership in the Communist Party on any level, plus innocent activities therein, was sufficient evidence of any defendant's participation in the conspiracy to justify and sustain a conviction.

Respondent further argues that the Smith Act must be construed in the light of its asserted Congressional purpose to destroy the Communist Party. The reasoning is that inasmuch as Congress intended the law to be applied to the Communist Party, the law must be construed in such a way that it will accomplish that purpose. This argument perverts the legislative and judicial processes. Legislation declaring certain conduct a crime must be deemed directed at that conduct and not at particular individuals or organizations. It is for the judicial process to determine whether the conduct complained of falls within the area of conduct condemned by Congress. The function of the judiciary is to determine whether the pattern of conduct falls within the scope of the legislation, not to pattern the legislation to fit the conduct. The latter requires treating the legislation as though it were directed at individuals or organizations instead of at some evil kind of conduct. So to construe legislation is to treat it as a bill of attainder.

V.

The Commission of Overt Acts in Furtherance of the Conspiracy Charge Within the Limitations Period Was Not Proved.

Respondent's assumption (R. Br. pp. 115-116) that petitioners would not question the sufficiency of proof of instances of overt acts had they been alleged in the indictment is unfounded. Even if the law were that the overt acts relied upon need not be alleged in the indictment, it is petitioners' position that there was no proof of a single overt act within the period of the statute of limitations. The examples cited by respondent as constituting sufficient overt acts (R. Br. pp. 115-116) do not meet the test. The preparation of the outlines for the "Marxist Institutes" by petitioners Yates and Schneiderman tend to prove innocence, not guilt, and certainly do not constitute an overt act directed towards the consummation of the object of the conspiracy, for these outlines, as is noted above, affirm opposition to the concept of the violent overthrow of our government. The incident involving petitioner Lambert, aside from the fact that the crucial evidence therein was limited to him and therefore could not be considered as proof of an overt act binding upon all of the petitioners, is fully dealt with in the brief for petitioners, pages 75-77 and 131-133, and respondent, in its brief, makes no attempt to answer petitoners' analysis of the evidence concerning this incident.

The reference to petitioner Carlson's attendance as an observer at a class of the "Marxist Institute" without one word of evidence as to what was said or done at this class as being sufficient evidence of an overt act underscores respondent's theory that anything done by any petitioner as a Communist or having any relationship to

Marxism is sufficient proof of the conspiracy and its execution. This is so, according to the respondent, even though it had a witness present at the class who could have testified to an advocacy or discussion or other conduct relating to the charge of advocacy of the overthrow of the government by force and violence, if there were any such facts to support the government's case. But without introducing a word of evidence on this subject, respondent asks the court to infer an overt act of advocacy of force and violence simply because one of the petitioners attended as an observer a class at which assumedly Marxism was discussed. The conclusion respondent would draw is sound only if the conspiracy embraces every member of the Communist Party and every person adhering to or interested in Marxism-Leninism.

Moreover, respondent does not contest the proposition that for the conviction to be sustained one of the overt acts set forth in the indictment within the period of the statute of limitations must have been proved by evidence sufficient to establish an act in furtherance of the conspiracy. Respondent argues that the two Lenin Memorial meetings which were proved as such alleged overt acts in this case were sufficient because "at such meetings as these * * * the Party was augmented and strengthened through the recruitment of new members" (R. Br. p. 117). There is absolutely no evidence in the record showing any recruitment at said meetings or resulting in any way therefrom. Respondent goes on, however, to urge that at such meetings the presentation of "hot" issues as "bait" was a method of interesting outsiders in the Party program "with the object of winning, if not new members, * * * at least 'passive allies'" (R. Br. p. 118). Clearly, then, any activity of the Communist Party is under this theory an overt act pursuant to a

conspiracy to advocate the overthrow of the government by force and violence, even if that act be supporting the provisions of the Bill of Rights. Thus the Communist Party is treated as though it were the conspiracy while at the same time the respondent concedes that this is not the charge, but that the charge is conspiracy to advocate and teach the overthrow of the government by force and violence. However, the argument is made that anything at all which is done through the Party is necessarily a step in that conspiracy. Accordingly, one must conclude, if this argument is accepted, that while being a member of the Communist Party is no crime, any act of any kind within the Party—innocent or protected, laudable or evil—makes one a conspirator to use the Party to advocate the overthrow of the government by force and violence. Logic would drive one even further. If, as respondent argues, recruiting a member into the Communist Party is an overt act in the conspiracy, it would seem to follow that remaining a member of the Communist Party is equally an overt act. If this be so, then respondent's argument leads it necessarily to the conclusion that mere membership itself is criminal.

The argument advanced by respondent that an eulogy of Lenin is an overt act in a conspiracy to overthrow the government of the United States by force and violence is indeed remarkable. There are undoubtedly many persons in this country and throughout the world who are not Communists and who admire Lenin—rightly or wrongly—as a great historical figure and a great thinker. One might ask whether all of these people, if they speak their mind, may be included in the conspiracy charged, or whether only Communists who express admiration for Lenin can be considered part of the conspiracy. Although the prosecution does not spell out its chain of

inferences with respect to this contention, they must run something like this: Lenin is the author of many of the extracts selected from writings upon which the respondent relies for the proposition that Marxism-Leninism must be construed as advocating the overthrow of the government of the United States by force and violence;[10] that the petitioner participating in the eulogy of Lenin must have read the same selected passages from the works of Lenin that have been cited by the respondent and construed them in the same way and ignored the other writings of Lenin, such as the examples set forth in the last footnote; that the eulogy of Lenin meant complete agreement with him (as his views are construed by the respondent) and indicated an intent to implement those views by advocating the overthrow of the government of the United States by force and violence; and that the eulogy was intended as a step in this direction. Such a series of inferences to the point of pure speculation would not support a conviction in any case, let alone one in which the First Amendment is involved. It should, of course, be noted that the record contains no evidence as to the content of the "eulogy," although the respondent had a witness present who undoubtedly would have testified to anything helpful to respondent's case.

The contention that the appeal for funds at one of the meetings rendered the meeting a step in a criminal con-

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[10]The selections are, of course, incomplete and carefully avoid such statements of Lenin as that his object during the period of the Kerensky Government was "to win a majority in the Soviets, to change the policy of the Soviets and through the Soviets to alter the composition and policy of the Government.

"This was a line envisaging a peaceful development of the revolution." [Ex. 28, R. 1362; R. 7034-5 at App. 68, pp. 257-8; R. 1491-2].

spiracy is simply another aspect of the argument that anything at all which is done to aid the Communist Party is part of an illegal conspiracy and in fact, if not in words, treats the Communist Party as the conspiracy.

It is not necessary in this case to determine the minimum requirements of an overt act in furtherance of the conspiracy. But certainly some connection to advocacy of the violent overthrow of the government must be established, not by speculation or by a series of untenable inferences or by construing protected speech as evil or by the adoption of the seditious conspiracy technique. Here the overt acts relied upon by the government established nothing more than protected legal organizational activity by an unpopular minority group, expresing views, some of which may have been extremely unpopular but none of which in any way ran afoul of the law.

VI.

Petitioners Were Deprived of a Fair Trial.

1. Respondent makes the point that the Philbrick articles made no direct reference to petitioners but concedes that they did refer to and deal with the "Communist Eleven" who were convicted in the *Dennis* case. Throughout the trial as in its briefs on appeal nd before this Court, respondent contended that petitioners were parties to the same conspiracy as the one found to exist in the *Dennis* case—or as they put it in their brief before this Court, they belonged to the "same army." Moreover, the articles both in their headlines and in the text talked about a "Communist conspiracy" to which all Communists allegedly belonged. There was no issue raised on the trial of this case as to the Communist Party membership of any of the petitioners. Under these circumstances it is

difficult to conceive how it can be cogently contended that the articles did not directly deal with a subject matter relating to the guilt or innocence of the plaintiffs on trial in the very case on trial—at least under respondent's theory of the case. It is true that the articles did not mention petitioners by name and did not say that it had been proved and established that they were guilty of the crime for which they were on trial. But they unmistakably said that all Communists (which would, of course, include these petitioners) were parties to a conspiracy to advocate the violent overthrow of our government.

Nor is the obvious prejudicial effect of such articles eliminated by the fact that the jurors were asked whether they had read these articles and answered in the negative. The articles continued to be published for a week thereafter and it would be surprising, indeed, if the jurors' attention were not directed to these articles during that week, precisely because of their participation as jurors in the trial. Nor was this probability lessened by the trial judge's admonition to the jury that they were not to read or listen to anything about the trial, for, as respondent itself argues, these articles did not deal with the trial. They simply assert that all Communists were engaged in the conspiracy charged in the indictment against the petitioners. Therefore compliance with the judge's admonition would not have resulted in the jurors refraining from reading the articles in question.

In 1951 when the trial began no one having any knowledge of the unpopularity of Communists could doubt that it would be difficult under any circumstances to obtain a fair trial for admitted members of the Communist Party charged with the violation of the Smith Act. To have the trial commence while articles like the Philbrick series were

in the process of being printed was to add an unnecessary and unfair obstacle in the way of the defense. The request for the 60-day postponement was a completely reasonable one and it could have been granted without in any way obstructing the course of justice, while taking a step reasonably possible in the direction of securing a verdict as free as the circumstances would permit from extraneous influences, pressures and prejudices.

2. An even more serious obstacle to a fair trial was the publication of the F.B.I. Memorandum, purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the government, on the eve of the case going to the jury and just as the defense had completed its arguments to the jury.

With respect to the Philbrick articles, the respondent argues that they did not mention the petitioners and for this reason the articles could not be prejudicial. With respect to the F.B.I. Memorandum, respondent states: "These quotations and comments [those appearing in the Memorandum] had all previously been received in evidence in this case" (R. Br. p. 124.)[11] But this, it would seem, is precisely the reason why the Memorandum was so extremely prejudicial. In effect what the respondent did was to permit a communication through the press from one of its high officials, a figure whose authoritative position in the

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[11]This is true of the quotations but not of the comments. There was no witness in the case who testified that the Communist Party advocated the forceful overthrow of the government of the United States by force and violence. To the contrary, one of respondent's witnesses testified that when he was a member and high official in the Party it was his understanding that it did not so advocate (P. Br. p. 95). What the Memorandum did include, insofar as comments are concerned, is all-out support of the government's argument with respect to the conclusions to be drawn from the evidence.

mind of the average American cannot be doubted, stating that after long study and after secret investigation by the Federal Bureau of Investigation, he had reached the conclusion that the quotations in evidence in the case on trial proved beyond any doubt that the Communist Party was engaged in a conspiracy to advocate the overthrow of the government by force and violence. And this communication was tendered to the jury through the press just as the defense had completed several days of argument contending to the contrary. If Mr. Hoover had been called as an expert witness during the trial it is doubtful whether he would have been permitted to express the conclusion which he set forth in his Memorandum. But even if he had, he would have been subjected to cross-examination and the defense would have had some opportunity to attempt to meet this testimony. But here this testimony was offered outside of court at a time when the defense had said its last word and when the prosecution was addressing the jury making the very argument which the Memorandum stated the F.B.I. had established to be conclusively true. A more serious interference with the processes of justice is difficult to imagine.

Respondent argues, however, that in any event the publication of the Memorandum could not be harmful because the position of the Federal Bureau of Investigation could not possibly have been a surprise to the jury. If this theory were correct, there would have been no prejudice if Mr. Hoover had written a personal letter to each member of the jury enclosing a copy of the Memorandum which was published in the press. The fact that the publication came through the press rather than through such a personal letter in no way alters the fact that such communication to jurors is not only irresponsible but must be condemned as a practice which will not be tolerated

under the American system of justice. The fact is, however, that until this publication the jury had no way of knowing that Mr. Hoover had made the study embodied in the Memorandum or that he had reached the conclusions there stated. They may have guessed or speculated at it, but they could not have known it. Nor could such guess or speculation possibly have had the impact upon the minds of the jurors as the publication of the Memorandum must have had. In any event, what the jurors might have believed before the Memorandum was published with respect to whether the Federal Bureau of Investigation advanced the contentions set forth in the Memorandum, whether prejudicial or not, could not be avoided. But the publication of this Memorandum at the precise time when it was calculated to do the most damage conceivable to petitioners' case could have been prevented; and it should have been.

Petitioners do not take the position, as respondent seems to believe (R. Br. p. 30), that all government agencies had to remain silent about the Communist question during the trial. As a matter of fact, an examination of the newspapers during the six-month period of the trial will undoubtedly reveal numerous governmental statements on the question of Communism with respect to which the petitioners did not during the trial and have not on appeal raised any question. But none of them, aside from the Philbrick articles, constituted a direct and flagrant intervention in the processes of the trial itself by dealing directly and immediately with the issues of the trial and by, in effect, telling the jury how the case should be decided.

Respondent is in error in asserting that petitioners "insisted that only a single inquiry be made, viz., whether any juror had read or heard about the matter; if the

answer should be in the affirmative, they maintained, the judge would be required automatically to declare a mistrial." (R. Br. p. 127). What petitioners did urge was that it was incorrect to make a single compound inquiry from which it could not be determined at all whether or not the jurors had ever read the article (P. Br. pp. 294-296). They insisted that the question as to whether the article had been read should have been asked separately as was done in the case of *United States v. Flynn,* 216 Fed. 2d 354, 374, relied upon by respondent (R. Br. p. 129), where all of the members of the jury were asked whether they had read the article and they all replied they had not. That was then the end of the matter. Similarly, if a question had been put to the jurors here as to whether they had read the article and all of them had replied in the negative, that would have been an end to the matter here. But if any of them answered in the affirmative, then it was petitioners' position that either they were entitled to a mistrial or at the very least to a searching inquiry as to what effect if any the reading of the articles had had upon the state of mind of the jurors. There was simply no reason for the insistence by the trial judge on the single compound inquiry.

What petitioners objected to was a question the very form of which and the very manner in which it was put invited not a careful inquiry into whether or not prejudice had resulted from the articles but a covering up of the entire incident by inviting negative answers from the jurors. The procedure followed in the *Flynn* case was the one which should have been followed here. The jurors should have been asked whether they read the article and if there had been any affirmative answers the matter should have been gone into carefully in order to determine with some degree of certainty whether prejudice had re-

sulted as far as the individual jurors who had read the article were concerned—indeed, if such jurors should not have been removed from the jury entirely and a mistrial granted if necessary. Anything less than such a searching inquiry of the jurors who admitted reading the article would have served merely to conceal its impact, not to reveal it and to correct the prejudice which had been created.

VII.
Conclusion.

Respondent's brief fails to meet the contentions advanced in petitioners' opening brief, and its arguments affirmatively establish the invalidity of petitioners' convictions.

The judgments of conviction should be reversed and the indictments as to each of the petitioners should be ordered dismissed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1956

No. 6

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

No. 20

STEPHEN MESAROSH, also known as STEVE NELSON, BENJAMIN L. CAREATHERS, IRVING WEISSMAN, JAMES H. DOLSEN, and WILLIAM ALBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

	PAGE
Interest of American Civil Liberties Union	1
Statement of the Case	3
ARGUMENT:	
I. Proof of Advocacy and Teaching of the Doctrines of Marxism-Leninism by the Communist Party, Together with Proof as to Each of the Petitioners of Membership and the Holding of Office in the Party and Participation in Lawful Activities Therein, is Insufficient to Sustain the Convictions Below	5
A. Some Pages from the Historical Record	6
B. Appraisal and Summary	13
II. The Strength of American Institutions Obviates a Finding of Any "Clear and Present Danger" of an Attempt to Overthrow the Government by Force and Violence	15
A. Strength and Influence of the Communist Party in the United States	15
B. The Strength of American Political Institutions	21
C. The Strength of the American Economy	24
D. Appraisal and Summary	26
Conclusion	28

Table of Cases Cited

Abrams v. United States, 250 U. S. 616	11
Adler v. Board of Education, 342 U. S. 485	20
Adler v. Wilson, 282 N. Y. App. Div. 418	20
American Communications Ass. v. Douds, 339 U. S. 382	18

PAGE

Baltzer v. United States, 248 U. S. 593 10
Baumgartner v. United States, 322 U. S. 665 ..... 5, 14

De Jonge v. Oregon, 299 U. S. 353 15
Dennis v. United States, 341 U. S. 494 ..... 3, 4, 5

Hartzel v. United States, 322 U. S. 680 ..... 5, 14
Herndon v. Lowry, 301 U. S. 242 14

Klapprott v. United States, 335 U. S. 601 14
Knauer v. United States, 328 U. S. 654 14
Kotteakos v. United States, 328 U. S. 750 6
Krulewitch v. United States, 336 U. S. 440 6

Mesarosh v. United States, No. 566, October Term, 1955, Appendix B 3

New York Trust Co. v. Eisner, 256 U. S. 345 4

People v. Spies, et al., 122 Ill. 1 14

Schaefer v. United States, 251 U. S. 468 13
Schneiderman v. United States, 320 U. S. 118 ..... 6, 14
Stack v. Boyle, 342 U. S. 1 6
State v. Boloff, 138 Ore. 568 13

United States v. Cooper, Wharton, St. Tr., 663 9
United States v. Lebron, 222 F. 2d 531 (2 Cir.) 21
United States v. Lyon, Wharton, St. Tr., 333 8

Whitney v. California, 274 U. S. 357 27

Yates, et al. v. United States, No. 308, October Term, 1955, Appendix "C" 3

Statutes Cited

Act of June 25, 1798, 1 Stat. 570 8

Act of July 14, 1798, 1 Stat. 596 8

PAGE

18 U. S. C. 371 3

Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 26

Authorities Cited

Acheson, *A Democrat Looks at His Party*, 120 (1955) 23

Allen, *The Unsystematic American System*, Harper's Magazine, June 1952, p. 24 22

Almond, *The Appeals of Communism*, 207 (1954) .. 22

Annual Report of House Committee on Un-American Activities for the year 1951, February 17, 1952 .. 19

Annual Report of House Committee on Un-American Activities for the year 1953 February 6, 1954 19

Brogan, *Politics in America* 2 (1954) 22

Brown and Fasset, *Loyalty Tests for Admission to the Bar*, 20 Univ. of Chi. L. Rev. 480 (1953) 20

Carr, *The House Committee on Un-American Activities* (1952) 23

Chafee, *Free Speech in the United States* (1948) ..10, 12, 14

Chafee, *The Free and the Brave* (1950) 7, 10, 12, 22

Commager, *The American Mind* (1950) 20

Communist Domination of Certain Unions, Senate Doc. No. 89, 82 Cong., 1st Sess. (1951) 18

The Communist Party of the United States of America, report of the Senate Internal Security Subcommittee (84th Cong., 1st Sess., Dec. 21, 1955) .. 16

Digest of the Public Record of Communism in the United States (1955) 17, 20

PAGE

Economic Report of the President, January 24, 1956 24

Final Report on Foreign Aid of House Select Committee on Foreign Aid Pursuant to H. Res. 296, May 1, 1948 26

Gellhorn, *The States and Subversion* (1952) 17

Hale, *Thirty Who Were Tried* (London, 1955) 7, 17

Hand, *The Spirit of Liberty*, 34 (1952) 24, 25

Hearings, Internal Security Subcommittee, Senate Committee on the Judiciary, September 8, 1952 .. 20

Hearings on United States Foreign Policy for a Post-War Recovery Program, House Committee on Foreign Affairs, 80th Cong., February, 1948 22

House Committee on Un-American Activities Report, *The American Negro in the Communist Party*, December 22, 1954 20

Internal Security Manual (Revised) Senate Doc. No. 40, 84th Cong., 1st Sess., 244-287 (1955) 17

Jefferson to John Taylor, November 26, 1798, *Jefferson's Writings* (Bergh., ed.) 9

Jones, *Communism and the Movies, a Study of Film Content*, in Cogley, *Report on Blacklisting*, Vol. I (1956) 19

Kennan, *Realities of American Foreign Policy* (1954) 24

Keyserling, *Saving American Capitalism* (1948) .. 23

The Legal Status of the Communist Party, Note, 34 Va. L. Rev. 450 (1948) 16

Mac Iver, *Academic Freedom in Our Time* (1955) .. 20

May, *Constitutional History*, II 7

PAGE

Monthly Labor Review, U. S. Dept. of Labor, B. L. S., October, 1954 18

Nevins, in *The Saturday Review of Literature*, February 6, 1954 23

New Haven Register, February 17, 1956 16

New York Times:
April 25, 1950 21
May 3, 1950 16
August 9, 1950 16
December 3, 1953 17
December 14, 1953 17

O'Brian, *Civil Liberty in Wartime*, 42 Rep. N. Y. Bar Assn., 275 (1919) 6

O'Brian, *National Security and Individual Freedom*, 73 (1955) 22

Report to House Subcommittee on Appropriations, Dept. of State, Justice and Commerce Appropriations for 1954, 83rd Cong., 1st Sess., February 25, 1953 ..... 16, 26

Richardson, *Messages*, I 11

Smith, *Freedom's Fetters* (1956) 8, 9, 10

Taft, *The Structure and Government of Labor Unions* (1954) 18

U. S. News and World Report, March 30, 1951 ..... 16, 18

Warren, *Security in a Free Society*, Current History, October, 1955 24

Zeisler, *Reminiscences of the Anarchist Case*, 21 Ill. L. Rev. 224 (1926) 14

IN THE

Supreme Court of the United States

October Term, 1956

No. 6

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 20

STEPHEN MESAROSH, also known as STEVE NELSON, BENJAMIN L. CAREATHERS, IRVING WEISSMAN, JAMES H. DOLSEN, and WILLIAM ALBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The American Civil Liberties Union, appearing herein with the consent of all the parties filed with the Clerk of this Court, is a nationwide non-partisan organization devoted solely to the protection and advancement of the Constitutional rights fundamental to the democratic way of life. It has no other program, either political, economic, social, or philosophical.

Amicus' primary concern with the instant cases is that this Court's validation of the convictions here involved would cause a contraction in freedom to exchange political opinions in America, particularly on international issues, and a loss in the cognate freedom to associate for the purpose of political expression. The instant convictions not only would establish a precedent lessening the protection of the First Amendment guarantee for all Americans, but would, here and now, spread a restraint over the rights of expression and association of Americans generally.

The cases now before this Court have, to amicus, an enhanced importance because it believes there has been a widespread disregard of First Amendment principles in the past few years, which has for one reason or another escaped judicial scrutiny. Judicial guidance back to First Amendment principles by invalidation of the instant convictions would be most opportune and salutary; it would help revive the traditions and patterns of free thought, free expression, and free association which in day-by-day practice are being transformed and corrupted from their constitutionally-intended design.

Amicus recognizes that the Communist Party has a dual nature, engaging publicly in the forms of expression and association usual to political parties and organizations, but also engaging covertly in anti-democratic methods in

aid of the aims of Soviet Russia. Amicus is concerned solely with protection of the rights of individual Communist Party members in the first role, because of the effect of restraints in this area on principles and practices affecting freedom of expression and association for all Americans.

Statement of the Case [1]

This brief is submitted in support of petitioners herein on two issues: first, whether proof of advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party, together with proof as to each of the petitioners of membership and the holding of office in the Party, and participation in *lawful* activities therein, is sufficient to sustain a conviction for conspiracy to violate the provisions of the "Smith Act," 18 U. S. C., §§ 371, 2385. Second, whether in petitioners' cases there existed a "clear and present danger" of an attempt to overthrow the government of the United States by force and violence.

Under the rule of *Dennis* v. *United States*, 341 U. S. 494, we believe that the convictions below can be sustained only upon proof beyond a reasonable doubt that: (1) each of the accused knowingly and wilfully conspired to advocate and teach the overthrow of the government of the United States by force and violence, and to organize as the Communist Party of the United States, a society, group or assembly of persons who so teach and advocate (*id.*, at pp. 496-7); (2) each of the accused conspired as aforesaid with the specific intent to overthrow the government of the

[1] The facts relied on by the Amicus are set forth in Appendix C of the Petition for Certiorari submitted in *Yates, et al.* v. *United States*, No. 308, October Term, 1955, and Appendix B of the Petition for Certiorari in *Mesorosh, et al.* v. *United States*, No. 566, October Term, 1955.

United States by force and violence as speedily as circumstances would permit (*id.*, at pp. 499-500, 515-16); (3) each of the accused so unlawfully conspired with the intent that such teaching and advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action (id., at pp. 511-13); and that (4) the aforesaid conspiracy, accompanied by such specific unlawful intents involving defendants proven to have the "power to bring about the evil," coupled with "the inflammable nature of world conditions," justifies the finding of "clear and present danger," as defined by this Court, of an attempt to overthrow the government of the United States by force and violence (*id.*, at pp. 502-11).

In this brief, we do not intend to deal with the legal issues ably and forcibly presented in the briefs of petitioners and the Government. Rather, we intend to demonstrate that the conviction of petitioners on the evidence adduced against them, when measured against the yardstick of history, cannot stand, and in this connection we note that "A page of [it] is worth a volume of logic." Holmes, J., in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349. Moreover, an examination of the political institutions of this nation demonstrates a factual condition which is inconsistent with a finding by this Court of a "clear and present danger"[2] of an attempt to overthrow the government of the United States by force and violence.

In this context, then, we urge that the judgments below be reversed.

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[2] When we speak of "clear and present danger," we use the term as defined in *Dennis* v. *United States*, 341 U. S. 494, 502-11.

I

Proof of advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party, together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein, is insufficient to sustain the convictions below.

In some criminal cases the only intent which must be proved is the intent to commit the prohibited act; in most such cases an intent to violate the law or reckless disregard of the law is also required. In the present cases, however, the intent which must be established is not merely one to advocate forceful overthrow of the United States Government and to organize to that end in deliberate violation of the law or in wilful disregard thereof. There is a separate and additional element of intent which must be proved beyond a reasonable doubt—the intent to actually overthrow the Government of the United States by force and violence as speedily as circumstances will permit. This was clearly stated in *Dennis* v. *United States*, 341 U. S. 494:

> "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." *Id.*, at p. 499.

In recognizing that the *Dennis* case involved the right of free speech, this Court was not content with pointing out that intent is an essential element of the offense. It went on to say, "Where there is doubt as to the intent of defendants * * * this court will review the convictions with the scrupulous care demanded by our Constitution." *Id.*, at p. 516. Thus, if a conviction for conspiracy to *advocate* is to stand consistently with the First Amendment, we think proof of intent must be unequivocal, convincing and clear. See, *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; *Hartzel* v. *United States*, 322 U. S. 680, 687.

The historical record supports the view of John Lord O'Brian: "The chief difficulty * * * has naturally been the question of what *quantum of evidence* would, as a matter of law, justify submitting to the jury the question of unlawful intent * * *." *Civil Liberty in War Time,* 42 Rep. N. Y. Bar Assn. 275, 309 (1919). This difficulty is made even more difficult in "conspiracy" cases because of the general rule that acts and declarations of one conspirator, made in furtherance of the conspiracy, are admissible against all fellow co-conspirators. *Krulewitch* v. *United States,* 336 U. S. 440. But while a hundred officials of the Communist Party may be hardened revolutionaries, the hundred and first may be a political deviationist, a backslider, or even an FBI informer. This Court has acknowledged that "men in adhering to a political party or organization notoriously do not subscribe unqualifiedly to all its platforms or asserted principles," *Schneiderman* v. *United States,* 320 U. S. 118, 136, and that even where the charge is criminal conspiracy, "guilt * * * is individual and personal." *Kotteakos* v. *United States,* 328 U. S. 750, 772. See also: *Stack* v. *Boyle,* 342 U. S. 1, 9.

The reasons requiring that the necessary specific intent be brought home *personally* and individually to each co-defendant in these cases by unequivocal, clear and convincing evidence stem from experience at least 163 years old. And if we are not to learn from the acknowledged errors of our forebears, free discussion of the problems of society—a cardinal principle of our democracy—may in future become only an historic relic.

A. Some Pages from the Historical Record

In 1793, Thomas Muir was convicted in the High Court of Justiciary at Edinburgh, Scotland, under an indictment which charged him with making speeches criticizing the rotten borough system and advocating the extension of the elective franchise in which he represented the govern-

ment as oppressive and tyrannical, and the legislative body of the State as venal and corrupt. The indictment went on further to allege (and this was the gravamen of the charge) that Muir advocated, exhorted and advised people to read the works of Thomas Paine and recited a long series of polemical quotations from the works of Paine.[3] In his charge to the jury, the Presiding Judge, Lord Braxfield, stated:

> "The British Constitution is the best in the world; for the truth of this, gentlemen, I need only appeal to your own feelings. Is not every man secure in his life, liberty and property? * * * Does not every man enjoy unmolested the fruits of his industry? And does not every man sit safely under his own vine? * * * I leave it for you to judge, whether it was perfectly innocent or not in Mr. Muir, at such a time, to go about among ignorant country people, and among the lower classes of the people, making them leave off their work, and inducing them to believe that a reform was absolutely necessary to preserve their safety and their liberty, which, had it not been for him, they never would have suspected to have been in danger. * * * Mr. Muir's plan of discouraging revolt and all sorts of tumult was certainly political; for until everything was ripe for a general insurrection any tumult or disorder could only tend, as he himself said, to ruin his cause; he was, in the meantime, however, *evidently poisoning the minds of the common people and preparing them for rebellion.*" (Emphasis supplied.)[4]

American sentiment about Muir's conviction is best evidenced by the American expedition of 1796 to rescue Muir from New South Wales, where he had been transported under sentence by Braxfield for fourteen years.[5]

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[3] See May, *Constitutional History*, II, 38-41.

[4] Hale, *Thirty Who Were Tried* (London, 1955), 61-62.

[5] Chafee, *Free Speech in the United States*, 26 (1948).

In 1798, Representative Matthew Lyon of Vermont was convicted of sedition under the "Alien and Sedition Acts of 1798".[6] The indictment charged Lyon with wickedly and maliciously contriving to defame the Government and the President "with force and arms" with the intent and design to bring in contempt and disrepute and to excite the hatred of the people of the United States against the President and to stir up sedition in the United States. The indictment further charged him with publishing a letter which expressed wonder that a speech by President Adams before the Senate had not caused "an order to send him [Adams] to a madhouse. Instead of this, the Senate have echoed the speech with more servility than ever George III experienced from either House of Parliament." *United States v. Lyon,* Wharton, *St. Tr.*, 333, 334.

At Lyon's trial, prosecution witnesses testified that he used the publications complained of for political purposes, employing language "highly disrespectful to the administration." Another witness testified that Lyon's reading of the letter at public meetings in Vermont had created a commotion, and one of them had heard a person say at a political rally that there must be a revolution. See, Smith, *Freedom's Fetters*, 233 (1956).

The presiding judge, Associate Justice Patterson of the United States Supreme Court, charged the jury that they had but two issues to decide in the case: (1) Had Lyon published the writings listed in the indictment? (2) Had he done so seditiously, that is, with "bad intent"? Since Lyon admitted the publications, the first question was undisputed. "As to the second point," the Judge added, "You will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the

[6] Act of June 25, 1798, 1 Stat. 570; Act of July 14, 1798, 1 Stat. 596.

President and the Government, and bringing them both into disrepute. If you find such is the case, the offense is made out, and you must render a verdict of guilty." Lyon was found guilty, sentenced to four months in jail, and fined $1,000. See, Smith, *Freedom's Fetters,* 234-235 (1956). After Lyon's conviction, Thomas Jefferson wrote, "I know not which mortifies me most, that I should fear to write what I think or my country bear such a state of things. Yet Lyon's judges, and a jury of all nations, are objects of national fear." [7]

In 1800, Thomas Cooper was charged with seditious libel under the Alien and Sedition Acts for stating, in 1799, that President Adams in 1797 "was but in the infancy of political mistake," and for other statements criticizing the conduct of the Adams administration. *United States* v. *Cooper,* Wharton, *St. Tr.,* 663. The case was tried before Associate Justice Samuel Chase of the United States Supreme Court, who instructed the jury that the government had to prove two facts: first, that the defendant wrote the publications in question, and, second, that he had published them with "bad intent."

According to the prosecution, "Government should not encourage the idea that they will not prosecute such atrocious conduct, for if this conduct should be allowed to pass over, the peace of the country would be in danger. Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection." Smith, *Freedom's Fetters,* 319-320 (1956). The prosecution argued that, since Cooper's words intended to undermine public confidence in the President, his intent must have been bad, and that it was the duty of the jury to show that this kind of attack on the Government could not be made with impunity. *Id.,* at p. 330.

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[7] Jefferson to John Taylor, November 26, 1798. *Jefferson's Writings* (Bergh, ed.), X, 63.

In the course of his charge to the jury, Judge Chase stated that "bad intent" had been proved, and the fact that Cooper had shown his publication to a prosecution witness and jokingly admitted that was his, was "outrageous," which action, said Judge Chase, "intended to dare and defy the Government, and to provoke them, and his subsequent conduct satisfied my mind that such was his disposition, for he justified the publication in all its parts and declared it to be founded in truth." *Id.*, at pp. 325-326. Cooper was found guilty, sentenced to six months in prison and fined $400.

In 1799, Jedediah Peck, a judge of the New York Court of Common Pleas and a member of the New York State Assembly, was indicted for publishing a petition to Congress advocating the repeal of the Alien and Sedition Acts. Although the case came on for trial before the United States District Court for the Southern District of New York during the April Term of the Circuit Court in 1800, the trial was postponed because the witnesses were not present, and thereafter prosecution against Peck was not pressed. Peck's arrest and indictment deeply stirred the people of New York and, perhaps more than anything else, served to destroy the Federalist Party in New York in the elections of 1800-1801. See, Smith, *Freedom's Fetters*, 390-396 (1956).[8]

Subsequent to Jefferson's inauguration in 1801, the Alien and Sedition Acts expired, all persons convicted thereunder were pardoned and Congress eventually refunded the fines.[9] In his First Inaugural Address, without specifically referring to the Alien and Sedition Act prosecutions, the newly elected President of the United States said:

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[8] But cf. *Baltzer* v. *United States*, 248 U. S. 593; compare the evidence adduced against petitioner Steinberg which establishes that he protested the jailing of co-conspirator Dennis.

[9] Chafee, *Free Speech in the United States*, 27 (1948).

"If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government can not be strong; that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question." Richardson, *Messages*, I, 322.

In 1918, five persons were convicted in the United States District Court for the Southern District of New York for conspiring to violate the Espionage Act because they agitated against United States intervention in Russia in the summer of 1918, by distributing a leaflet which contained the following call to arms: "Workers, our reply to the barbaric intervention has to be a general strike! * * * Workers, up to fight." See, *Abrams* v. *United States*, 250 U. S. 616. On the evidence adduced against the defendants, Professor Chafee comments: "It is hard to see how the jury could have convicted * * * if they had been instructed that a specific intent to hinder the war with Germany was necessary, but the judge * * * gave no explanation of the importance of this specific intent. He did not distinguish it from a general intention to publish the leaflets. Instead, the judge charged, 'People who have circulars to distribute, and they intend no wrong, go up and down the streets

circulating them. During the trial, although the defendants' counsel reminded him that Russian meetings in New York had been broken up, Judge Clayton said he would leave it to the jury whether throwing pamphlets out of windows squared with good, honest intention, and whether being anarchists and wanting to break up all government squared with honesty and sincerity of purpose. Soon afterward he stated

> 'If it were a case where the defendant was indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that.
>
> But I would have very little respect for a jury that would come in with a verdict that he didn't have any intent.'

"Plainly these rulings of Judge Clayton ignored the specific intent to oppose or hinder the war with Germany, as demanded by the statute; he authorized the jury to convict the defendants for intention to publish the pamphlets and a generally bad mind." *Free Speech in the United States,* 125-126 (1948).[10]

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[10] Some of the evidence on "intent" upon which the Supreme Court sustained the convictions of all five defendants was contained in writings of two of the defendants found in their possession. Excerpts from these writings indicated that the defendants planned to keep Allied armies busy at home so that there would be no Allied armies to spare for intervention in Russia. Professor Chafee concludes that "the defendants entered prison with the prospect of staying fifteen or twenty years largely because of scattered passages in manuscripts for which they were not indicted, and which they had neither printed or distributed. There is not the slightest testimony that Lipman [one of the conspirators] ever showed them to anybody after dashing them off. Moreover, the typewritten sheets were plainly a first draft for the English leaflet, and in revision all Justice Clarke's objectionable passages vanished. 'It is going pretty far to condemn an author for what he leaves out.'" *Id.*, at pp. 124-125. For an excellent description of World War I prosecutions under the Espionage Act, see, Chafee, *supra,* Chap. 2-4.

In *State* v. *Boloff*, 138 Ore. 568, the defendant was convicted of violation of the Oregon Syndicalism Act on the ground that he had been a member of the Communist Party for eight years, during which time he had paid substantial dues, had attended meetings where the red flag was on display and where he could see quantities of literature profusely illustrated with pictures of men engaged in violence. One of the prosecution witnesses testified that he believed that Boloff had attended a meeting where one of the speakers advocated the use of violence. Professor Chafee notes that;

> "The evidence against him consisted mainly of a large amount of Communist literature, much of it carried through the mail as second-class matter, and of testimony about what had been said at Communist meetings and conventions without proof that the statements of the most rabid speaker were ratified by the organization. The chief witness for the prosecution was a police officer who had joined the Portland Communist local a few months before to learn its nature, and had risen rapidly to become secretary and its delegate to two regional conventions. He and an immigration official gave expert testimony of the purposes of the Communist Party, and stated that it aimed 'to bring about an armed revolution at the very first opportunity.' On this testimony Boloff was convicted and given the maximum imprisonment of ten years in the state penitentiary, but was mercifully exempted from paying a fine. • • • Fortunately Boloff was released and the entire Criminal Syndicalism Act was repealed • • •." *Id.*, at pp. 479-480.[11]

B. Appraisal and Summary

The evidence against petitioners herein consists mostly of long, voluminous and inflammatory quotations from

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[11] Compare the unanimous ruling of this Court reversing the convictions of the President and Treasurer of the Philadelphia *Tageblatt* in *Schaefer* v. *United States*, 251 U. S. 468.

Marx, Engels and their more recent disciples. We think it more probable, so far as the respective juries were concerned, that the real defendants in these cases were not petitioners, but Lenin, Stalin, and others, neither indicted nor convicted. In connection with the World War I Espionage Act prosecutions, Professor Chafee notes that "far more discretion should have been exercised in the admission of prior utterances, because of the danger that the jury would convict the defendant as an undesirable citizen who, taken all in all, ought to be shut up." *Free Speech in the United States,* 78 (1948). Indeed, eighty percent of the testimony in the famous Chicago Anarchist case (*People* v. *Spies, et al.,* 122 Ill. 1) had to do with the doctrines and philosophy of anarchism. Zeisler, *"Reminiscences of the Anarchist Case,"* 21 Ill. L. Rev. 224, 244 (1926). In that case, four "conspirators" were hanged and another committed suicide. Governor Altgeld's "conclusion was that the eight defendants had been convicted not because they had been proved guilty of murder, but because they were anarchists." *Id.,* at p. 250. In the cases *at bar* it is not unlikely that petitioners were convicted because they were Communists, and not because they were proven guilty of teaching and advocating the overthrow of the government of the United States by force and violence.

In more recent times the technique of proving the required specific criminal "intent" of a defendant by imputing to him the "reprehensible" objectives proven against the organization of which he is an officer or a member, has been repeatedly rejected by this Court.[12] If "guilt by association" ranks low on the scale of judicial values, *"inferential" guilt by such association* commands even less respect. Chief Justice Hughes posed the issue clearly:

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[12] See, *e. g., Herndon* v. *Lowry,* 301 U. S. 242, 263; *Schneiderman* v. *United States,* 320 U. S. 118, 136; *Baumgartner* v. *United States,* 322 U. S. 665, 671; *Knauer* v. *United States,* 328 U. S. 654, 658; *Hartzel* v. *United States,* 322 U. S. 680, 687; *Klapprott* v. *United States,* 335 U. S. 601, 612.

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects." *De Jonge* v. *Oregon*, 299 U. S. 353, 365.

On this ground alone, we urge that the convictions below be reversed.

II

The strength of American institutions obviates a finding of any "clear and present danger" of an attempt to overthrow the government by force and violence.

In order to intelligently evaluate the likelihood of an attempt, successful or unsuccessful, at overthrowing our government by force or violence, it is essential to understand the comparative strengths of the organization or group suspected of wanting to subvert the established American political institutions, and the institutions themselves. Although statistics are undeniably important, they are ultimately useful only in relation to the historical and contemporaneous background of the institutions concerned —the development, effectiveness and vitality of their functions—which are themselves viewed within the larger framework of the nation's political, economic, social and moral health.

A. Strength and Influence of the Communist Party in the United States

Since the object of our inquiry here is both the nature and scope of Communist threats to the security of the United States, and the capacity of the Communist Party in the United States to carry out such threats, it is logical to first

examine their numerical and real strength. According to J. Edgar Hoover, Director of the Federal Bureau of Investigation, Communist Party membership in the United States since the end of World War II has been as follows:

1947	74,000	1953	24,796
1950	55,000	1955	22,663
1951	43,217	1956	20,000 [13]
1952	31,608		

Not only has there been no Communist ticket in national elections since 1940, but, in addition, no past or present member of Congress or of any state legislature has ever been elected on the Communist Party ticket (the same holds true, at the present time, of municipal offices, although there have been isolated cases in the past of Communists elected to city offices.[14] If the appeal of the Communist Party to the electorate has been so insignificant, it would seem highly unreasonable to believe that it could win wider popular support for an illegal program involving recourse to force and violence.[15]

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[13] Figures for 1947, 1951 and 1952 are taken from *U. S. News and World Report*, April 11, 1952, p. 35, quoting J. Edgar Hoover. Figures for 1950 are from *New York Times*, May 3, 1950, quoting from speech of J. Edgar Hoover. Figures for 1953 are from testimony of J. Edgar Hoover in Hearings before House Subcommittee on Appropriations for the Departments of State, Justice and Commerce (83rd Cong., 1st Sess.), Feb. 25, 1953, at p. 137. Figures for 1955 are from *The Communist Party of the United States of America*, report of the Senate Internal Security Subcommittee of the Judiciary Committee (84th Cong., 1st Sess., Dec. 21, 1955) at p. 34, based on F. B. I. report. Figures for 1956 are from interview with J. Edgar Hoover, reported in *New Haven Register*, Feb. 17, 1956.

[14] See Note, "*The Legal Status of the Communist Party*," 34 Va. L. Rev. 450, 455 n. 44 (1948).

[15] In a message to Congress dated August 8, 1950, President Truman said: "In the United States, the Communist Party has never received more than a minute portion of the national vote. The good sense of the American people, and their faith in democracy, have utterly rejected the false political appeal of Communism." *New York Times*, August 9, 1950.

With respect to the judicial branch of both federal and state governments since 1950-1951, there would appear to be no suggestions from serious, responsible quarters that a member of the Communist Party has ever held a significant position within the judiciary. By 1952, a series of administrative programs specifically designed to remove members of the Communist Party covered the entire executive branch of the Federal Government, including the armed forces,[16] and resulted in President Eisenhower's statement at a press conference on December 2, 1953, that "The Republicans • • • ought to expect and receive commendation from the voters for their efficiency in eliminating Communists from Government."[17] Within several weeks, Attorney General Herbert Brownell, Jr., "said • • • that he thought persons suspected of communistic tendencies 'are all out of Government now.'"[18]

The majority of the states have also adopted loyalty oaths or other measures which have the effect of disqualifying members of the Communist Party from public employment.[19] In New York, perhaps ten or fifteen state employees resigned or were dismissed in 1953 following their refusal to answer questions of the House Committee on Un-American Activities regarding Communist activities, and in a few metropolitan areas, particularly in New York, Detroit and Los Angeles, there have been removals of municipal employees pursuant to state laws or local regulations; a study of the persons removed and the security programs in effect suggests that few, if any, Communists held or now hold positions of influence in state and local administrations.[20]

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[16] See, *Internal Security Manual* (Revised) Senate Doc. No. 40, 84th Cong., 1st Sess., 244-287 (1955).

[17] See, *New York Times*, December 3, 1953, p. 2.

[18] See, *New York Times*, December 14, 1953, p. 1.

[19] See, Gellhorn, *The States and Subversion* (1952).

[20] See, *Digest of the Public Record of Communism in the United States*, 241-245, 472-487 (1955).

On the basis of the available data, at no time has the Communist Party or its members occupied any position of power in industry, exclusive of labor organizations. Since labor unions now require affidavits of non-membership in the Communist Party and, in many cases, have repudiated Communist influence and support, the strength of the Communist Party in labor organizations has greatly diminished since 1950.[21] The point was made by FBI Director J. Edgar Hoover in an interview published in *U. S. News and World Report,* March 30, 1951, p. 34:

> "Q. What is the activity of Communists inside labor unions, according to the information you have? A. We, of course, do not investigate labor unions, nor do we concern ourselves with employer-employee relationships. We have, however, investigated innumerable instances of Communist infiltration into labor unions. The Communists today do not have the power they once had, nor do they have the influence they once had in labor unions. The great majority of labor leaders and organizations are alert to Communist infiltration.
>
> Q. They have done a good job in cleaning them out? A. They've done an excellent job.
>
> Q. And the labor unions and their leaders have co-operated to the fullest extent with the FBI? A. That's right, in the great majority of instances."

The communications industries, specifically the mass media of the press, radio, television and motion pictures, have been extensively investigated by public and private groups both. On the basis of published records, informed opinion holds that the Communist Party had, prior to 1950, several hundred members among professional employees

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[21] See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382; *Communist Domination of Certain Unions,* Senate Doc. No. 89, 82d Cong., 1st Sess. (1951); Taft, *The Structure and Government of Labor Unions,* 30-32 (1954); *"Monthly Labor Review,"* U. S. Dept. of Labor, B. L. S., October, 1954.

of these media.[22] As a result of repressive measures beginning around that date, however, it is unlikely that the employment of Communist Party members in these industries since 1950 would reach even that figure. Whatever the numbers, no substantial evidence has been adduced to show that these persons have been able, since 1950-1951, if such was their purpose, to influence the output of the media on which almost the entire population of the United States relies for information and entertainment, either to advocate the overthrow of the government by force and violence, or for any other identifiable Communist purpose.[23]

With respect to religious institutions, no charges of Communist influence have ever been made as to the Catholic and Jewish clergy; although there have been a few charges, from dubious sources, of extensive Communist influence among certain members of the Protestant clergy,[24] there is no record after 1952 of any active clergyman having been convincingly identified as a member of the Communist Party.

Although one must be wary of drawing conclusions about Communists holding positions of power in American educational institutions (a large number of teachers called to testify before Congressional committees, for example, invoked the privilege against self-incrimination), some statistics are available, and these indicate that the highest number of members of the Communist Party in educational circles, in the 1940's, was about 1500 throughout the United

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[22] Annual Report of House Committee on Un-American Activities, for the year 1951, February 17, 1952, p. 9.

[23] See, *e. g.*, Jones, "*Communism and the Movies, A Study of Film Content*," in Cogley, "*Report on Blacklisting*," Vol. I, 196-304 (1956).

[24] 99 Cong. Rec. 2024; Annual Report of House Committee on Un-American Activities for the year 1953, February 6, 1954, p. 97.

States, of whom 750 to 1,000 were in New York City.[25] In view of the shrinkage of Party membership generally, this figure, even if correct, would expectably be much reduced for the period since 1950. School authorities, under a variety of statutory and administrative powers, have been diligent in removing suspected Communist teachers, and, in addition to many state statutes prescribing loyalty oaths and other tests for public employees, a number of states have special requirements for teachers that would have the effect of legally barring members of the Communist Party, thus practically eliminating the influence of the Communist Party in educational institutions.[26]

Without enumerating all the other professions, the influence of the Communist Party in them would appear to be almost non-existent. In one of them, however—the legal profession—the issue has been raised, and it should be observed that there have been very few disbarment proceedings in which Communist Party membership is an issue, and that the dominant professional association, the American Bar Association (as well as a large number of states) will not admit members of the Communist Party.[27]

With respect to the Communist position in the Negro community, the House Committee on Un-American Activities in its report, "The American Negro in the Communist Party," dated December 22, 1954, stated:

> "The committee can only conclude that the vast majority of Americans of the Negro race have con-

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[25] See, Testimony of Dr. Bella V. Dodd, former member of the National Committee of the Communist Party, *Hearings, Internal Security Subcommittee, Senate Committee on the Judiciary,* September 8, 1952, p. 13.

[26] See, *e. g., Adler* v. *Board of Education,* 342 U. S. 485; *Adler* v. *Wilson,* 282 App. Div. 418; MacIver, *Academic Freedom in our Time,* Chap. XI (1955).

[27] See, Brown and Fasset, *"Loyalty Tests for Admission to the Bar,"* 20 Univ. of Chic. L. Rev. 480 (1953).

sistently resisted the blandishments and treacherous promises offered them by the Communist conspirators. The committee hopes that this detailed exposure of the true Communist aims and tactics in relation to the Negro people will serve even further to reduce the extremely limited and temporary Negro support which the Communists have obtained by subterfuge."

Affirmatively, the evidence would tend to support the opinion that the strength of the Communist Party has been so slight since 1950 that it could not be supposed that an attempt to overthrow the government of the United States by force and violence would be feasible in the foreseeable future, or that the Party could recruit any sizeable number of its sympathizers to aid it in the commission of illegal acts outside the framework of our existing democratic institutions.

B. The Strength of American Political Institutions

In order to effectively estimate the real, as opposed to the theoretical, potency of the Communist Party as a force to be reckoned with, we have now to consider the political and legal institutions, as well as the social and spiritual values, which it purportedly menaces.

On authoritative opinion, the conditions existing in this country since 1950 would preclude almost automatically even the contemplation of a resort to violence, always excepting a lunatic fringe. For example, on April 25, 1950, the *New York Times* editorialized: "Mr. Truman was merely stating the obvious when he said that the 'internal security of the United States is not seriously threatened by the Communists in this country' but the reminder is worth while * * *."[28] American political institutions have so well and so consistently demonstrated their effectiveness

[28] As to the "lunatic fringe," see, *United States* v. *Lebron* (2 Cir.), 222 F. 2d 531.

in meeting ordinary needs, as well as withstanding the tremendous impact of two world wars, a devastating depression, and the continuing challenge of world-wide unrest, that their stability and permanence would seem to be virtually unassailable.[29] When one considers the demonstrated and verified strength of the Communist Party in the United States, as discussed above, there remains little possibility that an attempt at overthrowing the government by force and violence, in defiance of these established traditions and institutions, would have any chance of success, or, indeed, receive serious consideration from anyone at all familiar with the deep roots of our governmental institutions.[30] It may be noted that, in comparison with other periods in our history, there are relatively few protest groups in the United States; those who do have grievances show no inclination to look elsewhere than our political and legal institutions for the redress of their grievances.[31] Since no politically conscious and numerically significant segment of the population is denied access to political or legal means for the correction of injustice, the objective basis for advocacy of force is removed.[32]

It is also apparent from even a superficial examination that there is no similarity between the political and social conditions existing in the United States since 1950 and those in effect in Russia prior to 1917, Germany before 1933, or in China before the Chinese Communists came to power.[33]

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[29] Brogan, *Politics in America*, 2 (1954); Commager, *The American Mind*, 410 (1950).

[30] Almond, *The Appeals of Communism*, 207 (1954); Allen, *"The Unsystematic American System,"* Harper's Magazine, June, 1952, p. 24.

[31] O'Brian, *National Security and Individual Freedom*, 73 (1955).

[32] Cf. Chafee, *The Free and the Brave*, 9 (1950).

[33] *Hearings on United States Foreign Policy for a Post-War Recovery Program*, House Committee on Foreign Affairs, 80th Cong., February, 1948, Testimony of Wm. C. Bullitt, p. 1898, ff. and of Spencer Kennard, p. 1928 ff.

It is a poltical truism that revolutions, or the resort to force and violence, are not attempted in countries where the political institutions operate to satisfy the needs of most of the people.[34] So long as opposition groups believe, no matter how slight the possibility, that they may persuade others to their programs, they are unlikely to have recourse to methods which could only result in their own suppression.[35] And it is the very fact that the United States has a tradition not only of tolerating dissent, but of recognizing it, even where it is not especially welcome, as a potentially creative force, that is one of our principal safeguards. For "No great nation ever succumbed to the pressure of competing ideologies or forces unless it first weakened itself by self-inflicted wounds * * *." Keyserling, *Saving American Capitalism*, 94 (1948).

Public opinion polls, voting statistics, and the almost disappearance of organized radical groups lead to the inescapable conclusion that there has never been more general satisfaction with the operation of our system than there is today. No major economic group challenges either the political institutions or the property relations of the American society; trade unions accept the basic premises of capitalism, relying on collective bargaining for the achievement of goals which are generally approved by the American people; there is a continuing, widespread belief in the persistence of individual opportunity in the United States.[36] Indeed, "The belief, frequently expressed in this country, that there has been in recent years some sort of a triumph of Soviet propaganda is simply devoid of substance. The fact is that the ideological attraction of Soviet communism

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[34] Acheson, *A Democrat Looks at His Party*, 120 (1955).

[35] Carr, *The House Committee on Un-American Activities*, pp. ix-x (1952).

[36] Nevins, in "The Saturday Review of Literature," February 6, 1954, p. 47.

has declined generally since the mid-thirties." Kennan, *Realities of American Foreign Policy*, 72-75 (1954). Sidney Warren, Associate Professor of History and Political Science, California Western University, in *Security in a Free Society*, "Current History," October, 1955, points out:

> "There never was, nor is there now, any danger in this country of mass susceptibility to Communist blandishment. To believe otherwise is either to credit the Communists with hypnotic persuasive powers or to impugn both the good sense and the democratic integrity of the American people. An attempt has been made by the unscrupulous to enforce conformity of thought by using smears, innuendoes and half truths. The continued emphasis on the dangers of Communism, giving the impression that it has made substantial inroads in this country, only creates a diversion from the real global problems of our time, breeds suspicion among the American people, and impairs our prestige abroad * * *," *Id.*, at 209-210.

In any case, we agree with Judge Learned Hand that "our dangers * * * are not from the outrageous, but from the conforming; not from those who rarely and under the lurid glare of obloquy upset our moral complaisance, or shock us with unaccustomed conduct, but from those, the mass of us, who take their virtues and their tastes, like their shirts and their furniture, from the limited patterns which the market offers." *The Spirit of Liberty*, 34 (1952).

C. The Strength of the American Economy

If any proof were needed that the American society is a healthy and stable one, a few facts of our economic life should suffice. It is almost as well known to the rest of the world as it is to us that we are enjoying high prosperity in most branches of our economy, and have been since 1950.[37]

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[37] *Economic Report of the President*, January 24, 1956, pp. iii, 1-3, 166, 184, 192.

The recession or readjustment at the end of the Korean war, in the winter of 1953-54, was brief, with upward trends in activity promptly resumed, the principal exception having been farm income relative to expenses. However, it should be noted that this was due not to dearth, but to superabundance.[38].

Even more important than indexes of massive economic upsurge is the competence of government to intervene to forestall collapse or distress: the stabilizing contribution of government to the economy has never been so large, varied, and accepted in peacetime. Ours has increasingly become a mixed economy, with private and public springs of production, demand, and consumption. The commitment of the American people to the democratic method is nowhere more in evidence than in their firm belief in the future—that conditions of widespread unemployment, slumping prices and human want will be provided against by the organization of our society, and especially by action of the federal government.[39].

The shattering experiences of the Great Depression of the thirties, followed by World War II, accustomed Americans to the all-important role of government in the operation of our economy, with the emphasis on planning. Since the results exceed even optimistic expectations, and since the fruits of our economy can so readily be compared with the economic instability and resultant demoralizing insecurity evidenced by countries which in the past were on the eve of armed revolutions, or by countries where today Communism holds a certain attraction and wields a certain power, the confidence and trust reposed in the American government and the economic policies of an enlightened

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[38] *Ibid.*, p. 3.

[39] *Ibid.*, p. 1.

capitalism by the people of the United States have an inevitability about them.[40]

D. Appraisal and Summary.

The effect of the "Smith Act prosecutions" has not eliminated even the asserted "threat" to national security found in the *Internal Security Act of 1950*, 64 Stat. 987, 50 U. S. C. 781 ff. Rather, it has made the task of investigative agencies in the field immeasurably harder. In this connection, FBI Director J. Edgar Hoover says:

> "I would like to point out that the task of covering the field of subversion today is more difficult than it has ever been before in the history of this country. *As a result of the prosecutions under the Smith Act,* the Communists and other such groups are resorting to every means possible to prevent detection, going into the underground, holding meetings in out-of-the-way places, avoiding the use of telephones, using couriers for the transmission of messages, and in every way trying to effect their security program." *Report to House Sub-Committee on Appropriations, Depts. of State, Justice and Commerce Appropriations for 1954,* 83d Cong., 1st Sess., February 25, 1953, p. 136." (Emphasis supplied.)

Clearly, therefore, when petitioners are convicted of conspiring to *teach* and *advocate* the overthrow of the government by force and violence, the rule to be applied is the one enunciated by Mr. Justice Brandeis:

> "• • • [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the

[40] Compare the shaky structure of the Italian economy in 1948. *Final Report on Foreign Aid of House Select Committee on Foreign Aid pursuant to H. Res. 296,* May 1, 1948, p. 171.

processes of education, the remedy to be applied is *more speech, not enforced silence.*" *Whitney* v. *California,* 274 U. S. 357, 371 (concurring). (Emphasis supplied.)

On the basis of our examination of the strength and influence of the Communist Party in the United States, as compared to the strength of this nation's political institutions and the healthiness of its economy, we believe it clear that whatever the danger from the Communist Party may be, it comes not from petitioners' participation in a conspiracy to *teach* and *advocate,* but from "enforced silence." We believe it clear that to reasonable men the evil apprehended was not so imminent from 1950 to 1956 that it might befall before an opportunity for full discussion was had. Not only have we had "time to expose . . . the falsehood and fallacies," we have had time to expose it in the press, on the radio, through television and motion pictures. We have had time to expose it in our schools, in our churches, in our professions, in government, industry, and labor, and Congressional investigating committees have had time for not much else. We stand with Mr. Justice Brandeis: "[T]he remedy to be applied [in these cases] is more speech, not enforced silence," for the strength of our institutions obviates a finding of any "clear and present danger" of an attempt by these petitioners to overthrow the government by force and violence.

CONCLUSION

By reason of the foregoing, we urge that the judgments below be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. ~~308 - 310~~
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OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

APPENDICES TO PETITIONS FOR WRITS OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. ____

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

APPENDICES TO PETITIONS FOR WRITS OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Appendix A

United States Court of Appeals
for the Ninth Circuit

Oleta O'Connor Yates, Henry Steinberg, Loretta Starvus Stack, Frank Efroim Spector, William Schneiderman, Al Richmond, Albert Jason Lima, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly, Philip Marshall Connelly and Frank Carlson, Appellants, vs. United States of America, Appellee.	No. 13,480 Mar. 17, 1955

Upon Appeals from the United States District Court for
the Southern District of California,
Central Division

Before: Stephens, Fee and Chambers, Circuit Judges

James Alger Fee, Circuit Judge:

Defendants in this criminal case were convicted by a jury upon an indictment which charged them as participants in a conspiracy to commit crimes with the specific intent of causing the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit. The trial lasted over a period of some six months, and the jury, before returning its verdicts, took six full days for deliberation. Each de-

fendant has appealed from the judgment of conviction entered pursuant to the finding of the jury. Every phase of the indictment, the trial, the instructions and the theory of the Court has been raised by motion, objection, exception and assignment of error.[1]

The impressive feature of this case is that practically every assignment of error urged in this appeal has been ruled upon by the Supreme Court of the United States in Dennis v. United States, 341 U.S. 494.[1] There the basic statute in the original form was held "inherently" constitutional and also as applied to a situation involving a similar conspiracy connected with the unlawful concert found to exist in the case at bar. In the main and concurring opinions, principles were laid down which are virtually conclusive here. The defendants, notwithstanding this positive holding, paradoxically complain that the trial court here denied their motion to take testimony on written interrogatories with respect to the impact of the

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[1]A motion for bill of particulars was made and denied, a motion to suppress evidence upon the ground that the methods whereby it was obtained were illegal, a motion to dismiss the indictment on the grounds it was barred by "res adjudicata," a motion to order government agents to desist from surveillance during the trial, a motion to investigate alleged hampering of one of defendants prior to trial were made and denied. There were motions to strike from evidence declarations of third parties on various grounds. There were several motions for mistrial, and finally there were motions for arrest of judgment. Other motions of various types were made and denied. The opinion deals specifically with certain of these motions. Generally, the discussion covers the points raised. It would extend the discussion intolerably to cover each in detail. The rulings were not erroneous.

[2]In the District Court, this case was entitled United States v. Foster, 9 F.R.D. 367. The opinion of the Court of Appeals of the Second Circuit appears as United States vs. Dennis, 183 F.2d 201. Throughout the opinion here, that case will be referred to as "Dennis" in whatever court the particular proceeding may have taken place.

Smith Act and its enforcement on First Amendment rights, and rejected an offer of proof on the ground that the Dennis decision had foreclosed any further proof of unconstitutionality on the facts then before that court.

Defendants principally contend, as they must to prevail, that the trial court here departed in the course of the trial from the mandate so laid down by the Supreme Court: A careful analysis must be made of the opinions of the highest court, the statute as then written and the indictment in that case in order to appraise the claims of error in the instant appeal.

The indictment in the Dennis case was drawn in accordance with the basic statute, which appeared as Sections Ten and Eleven of Title 18, U.S.C. (1946 Ed.). Section Ten, as originally enacted and as it was in force at that time, read as follows:

> "(a) It shall be unlawful for any person—
>
> "(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> "(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> "(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any gov-

ernment in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

Original Section Eleven read as follows:

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

In the light of this statute, the Supreme Court wrote the principles which defendants say the trial court here refused to follow in several essentials. First, it is contended that basic liberties guaranteed by the First Amendment and other constitutional provision were submerged by an expanding wave of restraint brought about by an improper application of the Smith Act. Second, they say the highest court required a finding of a clear and present danger from the conspiracy, and none was made at this trial. Third, defendants claim the approval of the Supreme Court of certain other striking phrases given currency in the trial of the Dennis case constituted positive fiat that these be used in all future cases.

First, the Supreme Court ruled definitely that constitutionally guaranteed rights, including freedom of speech, of publication and of assembly, were not violated by indictment and conviction under the Smith Act in the form above quoted. The courts were dealing there with substantive law as set out in that statute, which related to organization for the purpose of teaching and advocating overthrow. Section Eleven of the Act as it then read, by use of the words "to conspire to commit," denounced

as principals all who engaged in the attempt or in joint action to bring about the acts specified as criminal. Mere membership or officership in the Communist Party, insofar as that organization was shown by the evidence to teach the proscribed doctrine, might have been taken as proof against the individual defendant of joint action with others to bring about the end intended.

However, in the face of the challenge of the dissents there, the Supreme Court held the nature of the joint activities of those involved was such as to bring about a "clear and present danger" and that, collectively, the conspirators had "power to bring about the evil." The latter phrase apparently meant that the setting in which the defendants there acted was such as to allow the court to conclude that the teachings might have resulted in an attempt at overthrow. It is true that, in accomplishing the result, the courts treated the Smith Act as though the substantive crime of conspiracy were charged. Moreover, the appellate courts approved the importation into the statute of a specific intent and object which was not expressly authorized by the wording of the particular section and which was not incorporated in the formal charge. As we shall see hereafter, the current indictment gave scope for these judicial additions.

Specifically in the second place, it is said the trial judge here violated principles there enunciated by failing to find a "clear and present danger" to the government by whatever the proof showed was said and done by defendants. In the Dennis case, with a factual situation typical of the case at bar, the highest court approved a statement as a matter of law by the trial judge that

a clear and present danger there existed in virtue of acts and intent of the defendants in that group. If that were a true rule of law for the Dennis case, it is the rule of law here. For world conditions at the date of that trial had not changed for the better when trial in the instant case was had. It must be remembered that the eleven convicted defendants in that case were named in this indictment as co-conspirators although not made defendants. Much of the literature and writings introduced were identical, as was the general type of proof, although we attempt no comparison of the respective records. While an independent conspiracy was charged here, the design was as closely connected as to the previous combination as a spoke to the wheel.[3] There organization was charged nationally, and here there was special emphasis on organization in California. The essential pattern was similar. Since this may not be the exact point of the contention, the matter will be considered in other connections later.

Finally, the opinion of the Court of Appeals and a concurring opinion in the Supreme Court gave approval of instructions of the trial judge in Dennis requiring the jury to find "language of incitement" was used by the conspirators there. Another phrase given approval is that the doctrine of destruction had became a "rule of action." In conjunction with an indictment based upon such a statute proscribing organization for the purpose of teaching and advocating overthrow, but which required neither proof of overt acts nor a specifically planned objective, such precautionary instructions were well enough. But these expressions of the judges in instructions in

[3]See Kotteakos vs. United States, 328 U.S. 750.

connection with the original statute established no unalterable requirement that such phrases themselves be used *ipsissimis verbis* where the changes in the basic law and an entirely different indictment predicated upon the conspiracy statute have rendered admonitions to a jury in such language supererogatory. Such claims have been answered in the main opinion in Dennis:

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. * * * To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

Defendants themselves say that there were significant legal and factual differences between the situation in the Dennis case and the case at bar. We agree. The situation has been changed by farreaching legislation and rulings in further and complete protection of the rights of these defendants. As a result, there are vital distinctions between this case and those which have been previously ruled upon.

The question is whether the trial court here followed the applicable concepts of Dennis in a changed situation. The attacks upon the manner in which the case at bar was tried and the incidents are now for consideration.

The indictment[4] charged the defendants themselves and certain persons convicted in the Dennis case with conspiring (18 U.S.C.A. Section 371) to commit offenses against the United States prohibited by the Smith Act as amended, 54 Stat. 670 (1940); 18 U.S.C. (1946 Ed.) Section 10, (1948 Ed.) Section 2385,[5] "by (1) willfully and knowingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as

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[4]The comparison of the indictments in the Dennis case and the case at bar is graphically set out in United States vs. Schneiderman, 102 F. Supp., at pages 97-102.

[5]The Smith Act, in the form in which it appeared upon the books at the time of the trial here and at present, reads as follows:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction." 18 U.S.C.A. § 2385.

speedily as circumstances would permit and by (2) willfully and knowingly organizing and helping to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence with the intent of causing the aforesaid overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

The means were elaborated by charging, as a part of the conspiracy, the matters epitomized as follows: (2) "conspirators would become members, officers or functionaries in the Communist Party." "and in such capacities would assume leadership" "and responsibility for carrying out its policies and activities"; (3) would cause to be organized units of the party in New York and California and would recruit members; (4) would publicize and circulate publications advocating overthrow; (5) would write articles and directives for printing in publications of the Communist Party; (6) would conduct schools and classes in which recruits and members would be indoctrinated; (7) would agree upon and carry into effect plans for vital parts of the Communist Party to go underground and there continue the conspiracy; (8) would use false names and documents to conceal their identities and activities as members and functionaries, and (9) would conceal the existence and operations of the conspiracy.

A series of overt acts were alleged to have been done by one or more defendants "in furtherance of the objective of the consp acy."

The first of the differences between this and the Dennis case is that the present indictment charges the inception of this crime as a continuing conspiracy on June 28, 1940, and in full effect until the date of finding of the indictment, which was December 21, 1951. This, of course, constitutes no ground for objection to the indictment. The mere fact that the indictment for the coordinate activities in the Dennis case was less broad in scope is of no avail to defendants here. Certain phases of the claim of variance will be dealt with later.

Second, it is contended that a change was caused by legislation for the protection of defendants. A new Act provided that officership or membership in the Communist Party should not constitute "per se" a violation of that Act, requiring registration by such members, "or of any other criminal statute."[6] Likewise, it was provided therein that registration by a Communist member or officer under that Act should not be used as evidence against him in any criminal proceeding. Apparently, this made a change in the law previously, as teachers and club chairmen were held to be in the position of co-conspirators in the Dennis case. 183 F.2d 230, 231. At this point, concern is had only with the effect of the section just referred to upon the indictment. The divergence from the form of indictment used in the Dennis case required peculiar phrasing emphasizing the individual nature of the charge. The instrument here highlights the fact that, among the means agreed upon, the individual defendants were to obtain membership and offices and assume leadership in order

[6]September 23, 1950, ch. 1024, Title 1, Section 4, 64 Stat. 991, 50 U.S.C.A. Section 783(f).

to bring about the objective charged. The Communist Party of the United States was not indicted. No defendant was indicted for organizing the Communist Party of the United States. None was charged with guilt because of membership or holding office in that party. But each was fairly charged with joining in concert of action to organize a society "as the Communist Party" and to use leadership therein with the intent to accomplish overthrow.

The third change was farreaching. Since the Supreme Court had upheld a conviction for joint action under substantive provisions of the Smith Act as then written, it was a great protection that Congress, by the change in the wording of the law, left the way open to discard the vague "conspiracy" clause of the original statute, and to use instead the standardized body of law with which the profession was familiar by framing the indictment under the specific enactment proscribing conspiracy as a substantive offense.

This section, which was first placed upon the books in the year 1867, is now codified with some changes as 18 U.S.C.A. Section 371, which reads in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The literature of the law relating to the substantive crime of conspiracy is voluminous and covers every phrase of

indictment, trial and judgment.[7] The use of the statute in this case was of great advantage to defendants as well as the government, since the precedents made the issues crystal clear[8] and enabled the trial judge to rule with justice. Specifically, this charge of the substantive crime of conspiracy placed the government under heavy burden as to proof, which will be explained hereafter. In the Dennis case, the courts treated the original Smith Act quoted above as containing a charge of conspiracy and applied the law without any of the limitations set up by the precedents which have been developed under Section 371. It cannot therefore be charged by any except a lawyer impelled by zeal for a client that the instant case is one "where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." But the objection is, of course, urged here by lawyers for the defendants. The concurring opinion of Mr. Justice Jackson in the Dennis case, which treated the indictment there as if it contained a charge of conspiracy as a substantive crime, was, of course, unsound as related to that case. The doctrine was treated as applicable in that opinion although the limitations contained in the statute are not mentioned. Although it is clear that, in the opinion of the other justices, a true conspiracy charge was not involved, the convictions were upheld in the face of the exposition of the place in our political structure which is maintained by personalized individual freedom of speech, publication and assembly.

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[7]The notes of decisions under this statute cover over 315 pages of United States Code Annotated.

[8]Cf. Pinkerton vs. United States, 328 U.S. 640.

An indictment which, as the one at bar, charges an agreement by two or more persons willfully and knowingly to organize a group, society or assembly of persons and thereby develop and use an apparatus designed and dedicated to advocate and teach overthrow and destruction of the government by force and violence when each person entering the concert of action is charged with entertaining the specific objective and intent of causing such overthrow pleads a "standard" conspiracy.

Where an unlawful agreement is set up, even though the means intended to be used were entirely legal, if the ultimate objective be criminal, a conspiracy is alleged. Under this indictment, if it be assumed that advocacy and teaching are immunized by the constitutional guaranties, still, even though these means were lawful and protected, since the advocacy was intended to cause the destruction and overthrow of the government by force, a criminal conspiracy was defined.

An overwhelming advantage to each defendant by indictment under 18 U.S.C.A. Section 271, was the provision thereof which required an "overt act" to be proved as well as a "conspiracy" before conviction could be had under this phase of the Smith Act itself. This was a far-reaching change from the situation in the Dennis case for persons accused. By the statement of things actually done by a particular person or persons, the matter was not left to conjecture as to the nebulous design based upon utterances and publications alone, but specific occurrences were to be set up whereby the supposed conspirators in unlawful agreement effected a debouchment into the field of positive action. Defendants make an elaborate theoretical

argument that the "act of conspiring" or "compassing by bare words or saying" or "the imagination of the mind to do wrong" is not sufficient "without an overt act." However effective this thesis might have been in the Dennis case, it is frustrated and rendered nought by the form of the indictment. Congress had already answered the theoretical thesis by the amendment above noted, which emphasizes the deep gulf between the situation here and that in the Dennis case. But the pleader here included the overt acts charged as carrying out the "standard" conspiracy of Section 371. Twenty-one allegations of overt acts were made, which is sufficient. The suggestion that the acts alleged were in themselves innocuous is not valid. The law relating to this crime does not require more than the allegation contained in the indictment that these were done in pursuance of the unlawful agreement and to effect the purpose thereof.

The principles of freedom applied to speech, publication and assembly must be preserved. Under the instant indictment, there are implications which must be considered, but the impact is much less direct than in the Dennis case. As heretofore indicated, the charge here is of a substantive conspiracy to act with a definite objective where one overt act must be alleged. The teaching and advocacy of the duty and necessity of destruction of the government by force and violence, although criminal by substantive enactment, are here by the language of the charge made subservient to the alleged purpose and object of organizing to advocate and teach with intent to destroy and overthrow as speedily as circumstances permit. The indictment in the Dennis case was entirely different.

Finally, a vital metamorphosis was brought about by attacks of defendants themselves upon the two original indictments. The trial judge held that such indictments did not sufficiently state the ultimate object of the conspiracy and the individual intent of each conspirator to bring the postulated action to fruition. In redrafting, the pleader amalgamated the two indictments and added the words which had been approved by the Supreme Court as sufficient to set forth a criminal state of mind in Dennis. The defendants were advised beforehand that the government was to establish as a prerequisite of conviction that each one had as an object "the overthrow and destruction of the Government of the United States by force and violence as speedily as the circumstances would permit." As noted above, it is hornbook law that a conspiracy is an agreement by two or more persons to accomplish a lawful objective by unlawful means or, on the other hand, by lawful means an illegal objective.[9] By making this one of the essentials of proof beyond a reasonable doubt by the government as to each individual before he could be designated as a co-conspirator, by the process of stating in the indictment the objects of the alleged "standard" conspiracy, a chemical change was wrought therein.

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[9]The trial court consistently and definitely ruled throughout the trial and the instructions that this was a conspiracy to violate the Smith Act. Although purists might find a difference between conspiring to teach, advocate and organize with intent to bring about speedy overthrow and destruction by force and violence and conspiring "to overthrow, put down, or destroy by force the Government of the United States," proscribed by 18 U.S.C.A. § 2384, the latter statute which was mentioned in the Dennis case (pp. 581-2) might well be applicable to the indictment here. No problem arises in that connection since the trial court clung to the theory that the Smith Act alone was applicable.

Defendants made a motion to dismiss the present indictment. It is implicit in the contention thereon that they assert the phrases heretofore referred to must have been included and that it must be charged formally that the activities of defendants created a "clear and present danger," that each defendant had "power to bring about the evil," that defendants conspired and agreed to use the "language of incitement" in teaching and advocacy, and that defendants conspired and agreed to make the duty and necessity of overthrow a "rule of action." Defendants were hampered in making such arguments explicit because neither the indictment in the Dennis case nor that in the Flynn contained any such allegations.

The trial court correctly held that the indictment charging a standard conspiracy to commit offenses against the United States in violation of the amended Smith Act, by teaching, advocating and organizing, alleging specific overt acts and defining precisely a proscribed intent, was sufficient.

Finally, in its present form, the indictment by its inherent terms charged not only that the language of incitement was used, but it was used in order that the proscribed doctrine should become a rule of action. It is the very gist and gravamen of the present charge that action was agreed upon in organizing local groups and societies in California and in infiltrating labor unions and other organizations. It was alleged that overt acts were committed. In ordinary crimes, this is sufficient. If conspirators to commit a crime of violence are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained.

This leads to another contention of defendants, which is laid at rest by the language of the charging instrument. It is contended that the trial court incorrectly defined the word "organize" used therein. But the indictment itself charges that the conspiracy was to organize a society, group and assembly of persons who advocate and teach the duty and necessity of overthrow "as the Communist Party." It is alleged that the conspiracy continued until the date of the finding of the indictment. But the basic charge was expanded by the specific clause. "Organize" is defined by exact phraseology in Section (3) of the indictment as follows:

> "It was further part of said conspiracy that said defendants and co-conspirators would cause to be organized Groups, Clubs, Sections, District and State Units of said Party in the State of California and elsewhere and would recruit and encourage recruitment of members of said Party concentrating on recruiting persons employed in key bases, industries and plants."

Even if the Communist Party of the United States were given a constitution and by-laws in 1945, as defendants contend, by the help of the co-conspirators and had certain officers, this does not mark the date when this combination completed organization of a group, society or assembly of people who advocate and teach destruction "*as the Communist Party of the United States.*"

The dictionary definition of organization indicates that "to organize an army" is a phrase which clarifies the meaning of the verb. If one started out to organize the 25th Army with nothing more than the order creating the

entity, organization would not be complete simply because the headquarters had been put together and the general officers and staff officers selected. The bare cadres of the regiment would not be sufficient. Recruitment, formation of units, completing officer personnel, regrouping of personnel in different units and expansion of various units to the prescribed or desired strength would be necessary. We may well agree that, once the 25th Army has been completely created to authorized strength and officered, thereafter recruiting for replacement or change of one regiment for another would not fall within the designation. The charge that there was a conspiracy to organize the 25th Revolutionary Army, there being no such organization at the time, might, of course, show that the concert of action for that purpose lasted for years.

This consideration brings up logically the next contention of the defendants that the Statute of Limitations barred prosecution in this case. The indictment itself destroys this argument. As noted before, it charges a continuing conspiracy from June 28, 1940, to the date of finding the indictment. The contention is that the Communist Party of the United States was completely organized in 1945 and that therefore the statute ran against this portion of the charge. It has already been noted there is no charge of conspiracy to organize the Communist Party of the United States as such. The activities of organization are particularly defined in the indictment. There is no doubt that certain of these activities occurred within three years of the filing of the formal charge.

The accusation is of a continuing conspiracy. Even if the above considerations were unsound, still the indict-

ment would be valid and timely because it is alleged that the conspiracy continued until the date of the finding in the indictment. If, in a conspiracy of a nonpolitical nature, it were alleged that the defendant combined and agreed to commit two offenses or crimes with the design to bring about an ultimate objective as soon as circumstances would permit and committed overt acts pursuant to the conspiracy within the three year period, the indictment would be sufficient. Even if it were established by judicial knowledge or otherwise that one of the substantive crimes charged as the objective of the continuing conspiracy had been fully consummate and complete, so that the statute of limitations had run against prosecution of the substantive offense, still an indictment would lie for a conspiracy, the grand objective of which had not yet been attained. Here, where the charge is that each defendant acted with intent to bring about the overthrow and destruction of the Government of the United States, it cannot be assumed from reading the indictment that the defendants abandoned the conspiracy until the event which they intended had been consummated. Only one conspiracy is charged, to commit several offenses against the United States. Therefore, the mere fact, assuming it to have been proved, that the crime of organizing had been complete, the conspiracy would still have continued in order to teach and to advocate destruction.

In this place, because it is a logical development, the question of the scope of the conspiracy in time and the supposed variance will be considered, although phases of proof and instructions enter therein. One of the most distorted concepts of the defendants is that, if an agent

or attorney employed by the United States has taken a position in some criminal prosecution that the Communist Party was completely organized in 1945 or that a court has accepted such a position for the purposes of the case before them, the United States is thereby estopped in this case from taking any contrary position. This concept is not founded upon any familiar doctrine of double jeopardy, res adjudicata or estoppel by judgment. Defendants make the claim for all parties and each defendant, whether or not he may have had connection with the previous litigation.

These contentions will be squarely met. None of these claims is valid. These defendants, who were not parties to the Dennis case or the Flynn case[10] can hardly have been prejudiced if the United States Attorney in Los Angeles charged a conspiracy separate from the ones in those case, as initiated in 1940 and continuing until 1950. The principles laid down by the Supreme Court in the Dennis case are applicable, but no one has contended that the facts of the two cases were exactly the same. The mere fact that there was a connection between the defendants and the parties charged in the Dennis case and that the over-all criminal design was the same is of no

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[10]In United States vs. Flynn (S.D.N.Y., unreported), the instruction was that the statute of limitations had run against the conspiracy so far as organizing was concerned. This may have been well enough as a precaution. Actually, it was prejudicial to defendants since the government was thereby relieved of the necessity of proving that the defendants combined to organize. The instruction on this feature was: "To find a defendant guilty, therefore, you must find that he conspired to teach, but it is not necessary that you find as well that he conspired to organize the Communist Party."

relevance. The government was not estopped from alleging and proving that these defendants conspired to help organize a society, group or assembly "as" a part of the Communist Party in the State of California.

The fact that another contention was made in another record or was stated by some court in dealing with other contentions is not binding here. The fact, if it be a fact, that there were constitution and by-laws adopted in 1945 would not mean that the party was organized except in the loose sense. But the organization of a group, society and assembly would not be completed by that formal constitution. There would still have to be members, and it was specifically charged that, to complete the membership in California, it was the design to add new groups and recruit new members. Of this defendants were on notice. They could not be heard to complain that in some other case the agents of the government proved something different. The defense offered no proof of a contrary state of facts than that shown here. Furthermore, there was not introduced in evidence any record in which the facts here claimed to have been adjudicated were established.

By the same process, the remainder of the defendants attempt to take advantage of the favorable opinion of the Supreme Court of the United States in the case entitled William Schneiderman vs. United States, 320 U.S. 118. Here again, no record was proven. The defendants here were not parties to the prior civil case. They could take no advantage of it, whatever the holding.

Furthermore, even as to Schneiderman himself, the denaturalization case was not res adjudicata. The record

was not introduced[11] as to him either. The true state of the matter was that the trial court there made findings of fact that Schneiderman was not attached to the principles of the Constitution of the United States because he was an officer in the Communist Party at the date of his admission, and cancelled his citizenship. The Supreme Court of the United States had no power to make findings on appeal, but dismissed the case, apparently on the ground that Schneiderman was not shown personally to have interpreted the Communist literature as advocating overthrow and that therefore the findings were clearly erroneous. Other opinions there seemed to go on the ground that, at the naturalization hearing, the court had found that Schneiderman was attached to the principles of the Constitution. In any event, whatever the holding it can do Schneiderman no good here. No precedent has been cited nor are there any which establish the doctrine that a prior judgment in a cancellation of citizenship case estops the government or that the findings therein are res adjudicata against the government in a subsequent criminal case. The analogies are all to the contrary. It is a bright idea, but no one seems to have thought of it before.

Attention is now directed to the claimed error in the admission of specific evidence. Apparently there is urged that no proof was admissible as to any overt act, because it is said none of those alleged could have been such as "clearly and unequivocally to effect the specific object of the conspiracy." The specific object, according to the in-

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[11]The majority opinion of the Supreme Court without the dissent was introduced, which was highly favorable, but this did not supply the essential foundation required to establish such an affirmative defense.

dictment was the teaching and the advocacy and organization for destruction and overthrow. Even belief may be removed from the circle of immunization, although this cannot be done "in the absence of over act indicating such was his interpretation."

To take one example, the indictment charged, as mentioned above, one such act in the following language

> "On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting."

The proof showed that the meeting was called for several purposes, as outlined below. Steinberg made a number of speeches there, and stated that "this was a Lenin Memorial meeting," at which he presided. An announcement of the meeting in the People's World asked persons to attend and "demonstrate for the Bill of Rights" as it would "serve primarily as a protest against the current trial in New York of twelve national leaders of the party." There was no question about the facts, which were uncontroverted, if the jury believed the testimony.

In the face of the objections that this was the act of a member and officer of the Communist Party and that it had no reasonable tendency to effect the proscribed objective, the evidence was clearly admissible to show the acts and intent of Steinberg personally or his participation. Without doubt, aside from this, the evidence was admissible on the allegation of the overt act. It was for the jury to determine, under proper instruction, whether the act was done with the intent and whether it tended to effect the object. Other allegations of overt acts made admissible proof thereof. No detailed discussion will be

accorded them therefore. In each instance, the evidence admitted could have been justified upon the ground that it was in any event relevant as to the intent or participation of a particular defendant.

The defendants object strenuously to the receiving in evidence of various classes of reported words of the defendants and other persons. This question has been raised in each of the cases which have arisen under the terms of this Act, and it has been uniformly held that the usual rules of the criminal law in relation to conspiracy prevail. The chief complaint as to the utterances of the defendants themselves is that they are not sufficient to establish conspiracy or intent. But the expressions of a defendant in a criminal case are admissible against him either as admissions against interest or as voluntary acts which it is testified he has done. These utterances of a particular defendant were not protected from admission into evidence by the guaranties of freedom of speech. They could be related to a jury for the purpose of allowing the jury to determine whether the party were acting with an innocent or guilty intent as required. In criminal cases, the utterances of a defendant reported in court by other witnesses have always been received to determine intent. The declarations and acts of each defendant on his own account are particularly important since his individual participation and intent must be shown independently of and without relation to declarations or acts of others.

Before the acts and declarations of third persons become binding upon an individual under the law of conspiracy, there must be shown to be (1) an illegal agreement to commit crime by two or more persons, (2) that the particular defendant was a knowing and willful par-

ticipant, and (3) that the act or declaration by third party conspirator was in pursuance to and in order to bring about the criminal objective. Proof of close association and concert of action over a period of years among those charged as co-conspirators might have established prima facie the unlawful agreement. If the other conditions were met, declarations and acts of third parties would be admissible against a particular defendant. In this connection, the proof of the association was not inadmissible by the particular defendant's membership or holding office in the Communist Party, for the indictment charges that the organization of a society or group was one of the objects, and even defendants do not claim organization of the party until 1945. But it is claimed that the third party declarant cannot be shown to be a co-conspirator by his own admission of membership in the party. This is correct. But proof of association in the activities, coupled with such a declaration might be sufficient. No instance was pointed out where such connection was not shown.

A great deal of evidence to prove "the nature and character and aims and objectives of the Communist Party" were objected to, and admission is assigned as error. It is, of course, agreed that the party was not indicted. But defendants were charged with conspiracy to organize a society or group to advocate and teach. Everything which was advocated and taught at meetings of the group or society would be relevant to determine what the purpose of the organization was. If it was found that the society or group was in the process of organization as the Communist Party, the teaching and advocacy under its auspices would be pertinent, whether

or not defendants were present. It is true, an expression or utterance at such meeting would not be binding upon the Communist Party and, unless made by a co-conspirator, would not be binding upon a particular defendant, but it would be admissible. However, what was taught and advocated at schools and meetings of the Communist Party after the date of the formation of the conspiracy would be admissible in order to prove how much, if any, success the conspirators had in carrying out their illegal plan to organize groups, societies or assemblies and obtain recruits and to teach and advocate destruction. This became particularly pertinent in determining whether the conspiracy was still continuing during the three-year period prior to indictment and in determining with what intent any defendant did one of the alleged overt acts within that period.

There was no statute such as the Smith Act before the passage of that enactment in its original form on June 28, 1940. It is contended that no evidence of the aims and objectives of the Communist Party then in existence (and which defendants claimed was later dissolved) by expressions at its meetings or the teaching in its schools was entitled to admission. But it must be remeinbered that some defendants were shown to have been closely associated with that organization and with each other, and they claim that its teachings were innocuous. The government was not selective, but introduced the literature and the expressions. These were pertinent if only to show there were other possible interpretations of the doctrine besides the version to which defendant Yates testified. Defendants had full opportuntiy to rebut these

interpretations. It cannot be said these were inadmissible. The trial court might possibly have excluded such testimony on the ground of considerations of remoteness or administrative convenience. It was unquestionably relevant and therefore it was not error or abuse of discretion to admit the evidence.

After the introduction of the evidence by the government, which ran over nine thousand pages besides the voluminous exhibits, all defendants rested except Schneiderman, Yates, Stack and Carlson. The evidence of the defense consisted of two witnesses who testified shortly, the reading of a deposition and the testimony of defendant Yates. The latter consisted almost exclusively in an exposition of her "understanding" of the Communist Party teaching and advocacy on achieving the socialist revolution. Although the evidence intrinsically must be sufficient to conviet beyond a reasonable doubt as to each defendant, it must be borne in mind that the jury weighed evidence which was in essentials uncontradicted.

Many of the arguments and indeed most of them, are reiterated in relation to the instructions given and refused. The trial court gave instructions on the subject of conspiracy to commit offenses against the United States, which are couched in precise and accurate language and which correctly reflect concepts approved by the Supreme Court and other federal courts over the period of approximately eighty years during which this law has been upon the statute books. Appropriate cautions were given to protect fully the rights of defendants.

It was said that the conspiracy must be found to have existed as charged before the allegations of overt acts

could be considered. The defendants contend that the overt acts charged in the indictment consisted of the exercise of either freedom of utterance, freedom of publication, or the free use of the right peaceably to assemble, and that therefore such acts, having been immunized by the Constitution, could not be used as indicia of crime. But it is well settled in ordinary conspiracy cases that the overt act proven need not have inherent criminal attributes or connotations, if it carries the illegal design into the field of action. For, if criminal purposes can be shielded from prosecution by the use of speech, there will be no more convictions of those clever enough to use this medium.

It is true such an act in itself could be innocent. In order to consummate the conspiracy, as the court said, "It must, however, be an act which follows and tends to accomplish the plan or agreement, and must be knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment."

The trial court carefully limited the effect of testimony as to membership and officership in the Communist Party. Cautions against use of "similarity of conduct" or "association" or discussion of common "aims and interests" as absolute tests were given. The court instructed:

> "It has been said that 'a conspiracy is a partnership in criminal purposes'. The gist of the offense is a combination or agreement to violate the law,"

and that, if all elements of conspiracy were established,

> "then the success or failure of the conspiracy to accomplish the common purpose or design is immaterial."

The requested instructions of the defendants, which the court refused, constitute a series of strange and distorted propositions as to the law of conspiracy. Defendants contend that it was error to refuse a requested instruction that "the burden of proof cannot be met by showing that a particular interpretation of Marxist-Leninist theory is the most correct or the most probable interpretation with an inference therefrom that the Communist Party accept such interpretation" embodies all these errors. The conspirators were not indicted for teaching Marxist-Leninist philosophy or that of Stalin or Malenkov, but for conspiracy sparked by an intent to destroy.

The indictment did not charge that this literature on its face bore a sinister meaning, nor even that the individual defendants gave it a sinister meaning. Interpretations of the teachings of the Communist Party have no relevance because that entity was not on trial, nor were the doctrines which may have been taught or advocated by it. Defendants individually must have been found to have had the intent of immediate destruction. Each must have been found to have become a member of a combination so to teach and advocate and to organize persons who so teach and advocate with this object in view. Thus the interpretation of the literature, the written objectives and the constitution of the Communist Party of the United States, and the writings and speeches of the members and officials were irrelevant except as these tended to prove or disprove the individual guilt of the particular defendant of the crime charged in the indictment. Some instructions requested would give complete immuniza-

tion to any speech, no matter if specifically uttered with the intent charged in this indictment. Any such formalistic test as this would, of course, give free rein to any subversive group because all they would have to do is to assemble to speak and to print words and distribute them. If then there could be argued that the meaning might be innocent on its face, the jury could not convict, according to appellants, even if it were one of the methods used to bring a conspiracy into the field of action.

Defendants apparently now contend the trial court should have told the jury that he found as a matter of law that the facts proved indicated "a clear and present danger." At least, they give lip-service to that contention. In our opinion, such an instruction could be justified only as a comment on the evidence. The instructions of the trial court clearly show that, if the jury convicted under the rules of law there laid down, they would have necessarily found a clear and present danger existed. If the trial judge had offered to instruct the jury as a matter of law on this subject, it seems that an exception[12] might have been taken on the ground of over-emphasis. The state of the evidence might justify it as it did in the Dennis case. Defendants can not rely upon the failure to make the comment by the trial court (a) because the exercise, whether justified or not, would be highly unfavorable to them, (b) because no litigant is entitled to a comment of fact by the judge, and (c) because the

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[12]As the record shows, objection was made to Government's proposed instruction No. 23, which embodied a charge like that given in Dennis (R. 12346-7).

normal place for the trial judge to rule upon the question of law as to sufficiency of the evidence, including presence of clear and present danger would be upon a motion for acquittal.

Closely connected with this is the objection that the District Court made no ruling upon the power of each of the defendants "to bring about the evil." But the Supreme Court did not require any such proof as to each defendant in the Dennis case. It is obvious enough that, if it had, there could have been no conviction. To require the court to instruct that the co-conspirators as a whole or that each defendant had the power to bring about the destruction of the government would be fantastic. If true, the revolution would have been consummated before trial. To require such a finding by a jury would be to ask them to take counsel of fear. In reliance upon the national aims and aspirations and the just consent of the governed, there are no such fears. On the other hand, if the trial court had thought these actions and utterances were merely vaporings of ineffective folk, upon motions for acquittal, a verdict of acquittal could have been directed.

Again, defendants make a point about the "language of incitement." They said the co-conspirators must have agreed not only to teach and advocate the violent overthrow as a duty and necessity with intent to bring it about as speedily as circumstances would permit, but that the trial judge must have told the jury that, if it were found that they had agreed not to use the language of incitement in teaching and advocacy thereof, no crime would have been committed.

The gist of the substantive crime of conspiracy is that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute. The use of such phrases in instructions might have been well enough where a violation of the Smith Act alone was charged in its original form. It would be folly to command imperatively that these specific phrases be each used in instructions after a trial on an indictment such as the present one.

In ruling upon the motions for acquittal, the trial court[18] decided as a matter of law that there was sufficient evidence to prove guilt of each defendant. In this ruling the trial court placed itself firmly as to each defendant upon the indictment which charged a conspiracy. The Supreme Court, in its main opinion in the Dennis case, said, "The formation by petitioners of such a highly organized conspiracy • • • subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions • • • convince us that their convictions were justified." There was sufficient evidence to show that

[18]The attitude of the trial judge to the questions argued here, and many others, is set out in a series of opinions: United States vs. Schneiderman, 102 F. Supp. 87 (dismissing the two original indictments); 104 F.Supp. 405 (in camera inspection of documents); 106 F.Supp. 737 (disclosure of notes of witness); 106 F.Supp. 892 (striking of evidence); 106 F.Supp. 906 (motions for judgment of acquittal, new trial and arrest of judgment); 106 F.Supp. 927-941 (instructions to the jury).

such a conspiracy existed, particularized as to the California area, and that it was implemented by continuous organization and use of groups and societies for teaching and advocating with the proscribed intent, the determination of the trial court must be upheld. The arguments urging upon us that the trial court held that "advocacy plus intent" was sufficient to found a conviction has no basis. The trial judge did not rule that clear and present danger could be found to exist simply upon the basis of the possession of the proscribed intent. The trial judge "equated" "incitement" neither with "clear and present danger" nor "incitement" with the intent to bring about speedy overthrow. On the other hand, by applying the specific law of conspiracy, we are not convinced that the trial court found governmental powers by implication to be without inherent limits or exploited this law to engulf all powers which might possibly be exercised by an absolute sovereignty in the face of express prohibition. Indeed, the arguments presented by defendants and amicus curiae are paradoxical. Some of these declare with great insistence that there should not be one law for trial of Communists and another law for trial of persons charged with crime generally: a doctrine which requires no exposition in this Court. It is with utter inconsistency that they urge measures fantastic and bizarre which have never been applied in ordinary criminal cases. The most striking incongruities are found in these presentations. No further notice in detail will be taken thereof, but a short review of some of the matters considered by the trial court will prove the soundness of his rulings with regard to the evidence.

The most significant questions which are present in this record are those which relate to sufficiency of the evidence. The review by the Supreme Court of the Dennis case did not explicitly relate to the sufficiency of the evidence there. But the opinion of the Court of Appeals leaves no doubt that there was a sufficiency of evidence in that case. There is no attempt here to compare the content of the record in this case with that in the Dennis case or the Flynn case or any other case prosecuted under this statue.

There are only two questions in this regard for this Court. First, whether on each specific point essential for conviction there is sufficient evidence so that it can be said a jury could find the issue was established beyond a reasonable doubt and to a moral certainty. The jury, by the verdict, have already expressed their satisfaction with the proof. Second, whether, on the record as a whole, it affirmatively appears that the trial was fair and impartial and the verict can be sustained.

Many of defendants sought and obtained office as "organizers" in the party. The jury might well have inferred from this participation a carrying into the field of action a phase of an illegal agreement to organize a group, society or assembly and thereby to furnish the society with organs and to arrange and constitute into interdependent parts the Communist Party in California and to furnish recruits therefor. It must always be remembered that the jury were regularly instructed that membership or holding office in the party are not denounced as such. But this would not prevent them from concluding that acceptance of an office designated as

"organizer" with duties to assist in organization, evinced a participation in the unlawful agreement and, together with other circumstances as to a particular defendant, might prove it beyond a reasonable doubt.

The association of most of defendants among themselves and with other co-conspirators and with other persons whose advocacy of destruction is known was clearly proved. Their acts and conduct in close control of schools and classes where party members and putative recruits were taught the tenets of violent overthrow were clearly established. Indoctrination in techniques of action to induce revolution and of assaults upon citadels of bourgeois power was furthered and encouraged by these instruments. As to many of them, an individual finding that he was a well-trained professional revolutionist might well have been made. The concert of action of all could have been found by a jury beyond a reasonable doubt. The proscribed intent could also have been found as to any defendant. The jury were entitled to infer from the associations and the activities of the individual defendants participation in the unlawful agreement charged in violation of the specific statute. As to each defendant,[14] the jury might well have found a sufficiency of evidence of association and concerted action to convince them of guilt to a moral certainty by evidence

[14]Each of the separate defendants has filed a brief contending the evidence was insufficient to sustain a conviction as to him. These have been carefully considered in a review of the record. The evidence was sufficient to submit to the jury as to each. Certainly, therefore, as to each the evidence was sufficient to sustain a verdict of guilty. It is unnecessary to set out tabulations of the facts here.

which was inconsistent with every other reasonable hypothesis.

Therefore, it is the function of this Court to review the evidence in this case to determine whether the rulings of the trial court on the motions for directed verdict were correct.

We hold there was evidence from which the jury might have concluded beyond a reasonable doubt:

(a) That two or more persons named as conspirators, after June 28, 1940, had entered into a combination and conspiracy as charged in the indictment;

(b) That each defendant herein, knowing of the unlawful design, became a party thereto and entered into the combination and acted in concert with the others charged as conspirators;

(c) That after the formation of this conspiracy at least one overt act charged in the indictment to effect the object of the conspiracy and in furtherance of the objects thereof was performed by a defendant within three years prior to the filing of the indictment;

(d) That each defendant, in joining this concert of action and in any act done in furtherance thereof, had the specific intent to overthrow and destroy the government of the United States by force and violence as speedily as circumstances would permit.

Technically then, we find the trial impeccable from the standpoint of fairness and from the standpoint of adherence to principles theretofore laid down. It remains to consider some extraneous incidents. Appellants moved to postpone the trial because of the publication of a serialized article in a local paper with the usual lurid

announcements that revelations would be made as to "how the Communists intend to overthrow the U.S. Government and when" with a great deal more of similar import. The fact that the writer had been a witness in the trial of the New York defendants named here as co-conspirators was dwelt upon. The series opened January 20 and ended February 7, 1952. The trial opened and the jury was drawn on February 1. The defendants had opportunity for examination of members of the jury as to prejudice, bias and formation and expression of opinion. This is sufficient safeguard. No trial could ever be held during time of war, such as this was, if public discussion of vital national issues was the basis for postponement. The defendants had ample protection against an inclusion of a juror affected by such a newspaper discussion by the voir dire and the use of peremptory challenge. If the trial could have been postponed for sixty days for that reason, the defendants could never have been tried until Communism would have become a dead issue, no longer the subject of newspaper discussion. There was here no abuse of discretion.

There was a motion for mistrial based upon the affidavit of one of defendants, in which the following facts were set up: on June 25, 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, at the request of Senator McCarran, Chairman of the Senate Internal Security Subcommittee, forwarded to the latter a monograph prepared by this organization. This document dealt with the advocacy of the Communist Party of violent overthrow of the government, and contained considerable documentation from the so-called Marxist-Leninist clas-

sics. The monograph was released to the press in Washington by Senator McCarran on July 29, 1952. That day and thereafter, just as counsel for the defense had completed his first argument, the release commenced to receive widespread coverage in Los Angeles by all leading newspapers, radio and television, and through such media excerpts from the monograph were broadcast to the public. When the matter was called to the attention of the trial court by motion for mistrial, various suggestions were made as to how the matter might be handled to discover whether the jurors had disobeyed the continuous instructions of the court to confine their attention to the evidence. The defendants were clearly fencing. The trial court decided to trust the jury. This reliance upon members of that body to act as judges is in accordance with our finest traditions.

The trial court said: "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial." Unquestionably, the matter was of immense public interest and was within the public domain. The media of publication had a right to publish. It has been pointed out that the government of a republic cannot operate without the pitiless light of publicity. Great service is performed daily by exposure of matters which, if suppressed, would operate to destroy our security. When the country was at war, as it was on July 1, 1952, publicity was especially necessary over matters of national concern in moral and ideological defense of current aims. Still, it should never be forgotten that if there is failure to accord to defendants a fair and impartial trial in a criminal case, the

foundations are weakened. The powers of the trial court are conferred upon it for that express purpose. The media of publicity have an even greater responsibility than the courts to see that there is a fair trial of politically unpopular defendants. Somehow, there is a current belief that publicity is uncontrolled and that the courts are powerless to protect those charged with crime.

Ever since this Court has had this matter, there have been positive directions through publicity as to how it should be decided. But judges are products of a hardy climate. We do not palliate the offense, however. Such expressions do positive harm. It tends to make the public believe the courts accept such directions if the prophecy happens to be correct. It is much more true when a verdict of guilty is brought in after a great fanfare of publicity. With the trial court, we believe, to say the least, the incidents were extremely regrettable in the public interest.

However, a jury which had heard the evidence contained in this record over a period of six months, who deliberated for six days after the arguments, who had heard constantly reiterated warning not to read anything, not to listen to the radio and not to discuss anything which related to the case, probably tried to carry out their instructions and decide the case on the evidence. The trial judge believed this jury could be trusted. We do not think, simply because they arrived at a verdict of guilty, that his judgment was unsound.

Besides, there is a striking anomaly in the position of defendants. They claim the right to teach, advocate and assemble in the cause of sedition without interference so

long as they take no action. They claim the right to advocate the duty and necessity of the overthrow so long as they do so sotto voce. They claim the right to hold publicity meetings in honor of the political saint of a sinister foreign power and demand the acquittal of their fellow conspirators then on trial. Yet they protest the right of a United States senator to give out a release on a subject vital to the security of this country in time of war. Apparently the Bill of Rights is double-edged.

Even if the jurors or some of them heard or read some part of this public discussion—a fact not proved—this Court is of opinion the verdict was founded on the evidence. The trial court properly refused to invade the secrecy of the petit jury room in order to discover material to cavil at the determination.

In conclusion, in the Dennis case the court was dealing with the substantive crime denounced by the single statute.

> "The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of Sections 2(a) (1) and 2(a) (3) of the Smith Act, involved in the conspiracy charge."

This statute has now been amended and the present indictment is much broader and bottomed essentially on a different enactment. There, in construing the specific act, the main opinion suggests:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to

the particular situation, to ascertain if the Constitution prohibits the conviction."

While the Supreme Court professedly did not review the evidence of the trial, there is indication that, if it had not been deemed sufficient, the conviction of the co-conspirators would have been set aside. The main opinion states:

"'Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute."

It may be that prospects of larger policy or changes in the look of international affairs should be viewed to fix the acts proven here in perspective. But, as we understand it, as a lower federal court that is not our function. At the time this case was tried, there was a background of war. The law which was passed in 1940 was passed to meet emergencies created by war although not especially to meet the threat involved in this case. That enactment has been denounced as the first peacetime sedition law since 1798, although anyone who believes the country was not at war in 1940 does not squarely face the facts of life.[15] If the founders were advised that

[15]See opinion of December 23, 1940, Stone vs. Christenson, 36 F.Supp. 739: "The petition of Stone rings changes upon 'peace-

statute was necessary to meet the threat of the excesses of the French Jacobins then tending toward world-wide imperialism with a fatalistic zeal and a crusading flair and therefore compatible with the new Constitution, the Act of 1940 was probably advisedly deemed necessary by the Congress to provide for the national defense and protect the national ideals and aspirations.

On the other hand, the future of this country is embedded in the fundamental guaranties. The right to speak freely, even though tremendous majorities disagree, is fundamental. The power to assemble peaceably to present grievances is a foundation of liberty. The right to publish expressions and give them distribution despite official disapproval must be retained. The jury found defendants guilty beyond a reasonable doubt of conspiracy to commit offenses against the United States of America "with the intent of causing the aforesaid overthrow and destruction of the government by force and violence as speedily as circumstances would permit." The actions, teaching, publication and freedom of assembly allowed without implication of criminality seem sufficiently to have vindicated the fundamental guaranties. The trial court elaborated upon the rights of defendants as follows:

> "Under our system of law, guilt of crime is a personal and individual matter. You may not convict any defendant merely by reason of the fact that you may find him or her to have been an officer or member of the Communist Party of the United States, no matter what you may find were the principles and

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time' conscription. * * * but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, a failure to register manpower of the country would be a failure to provide for 'the common defense'."

doctrines advocated and taught by that party during the period covered by the indictment. * * * The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy. * * * Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants. * * * The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence. * * * The government referred to is the present Government of the United States, which does afford to the people democratic means for bringing about such changes as they desire; not some hypothetical future government which affords no such means. * * * The defendants, in common with all other persons living under our Constitution, have a general right protected by the First Amendment to hold, express, teach and advocate opinions, even though their opinions are rejected by the overwhelming majority of the American people; and have the further right to organize or combine peaceably with other persons for the purpose of spreading and promoting their opinions more effectively. * * * Whether

you agree with these opinions or whether they seem to you reasonable, unreasonable, absurd, distasteful or hateful has no bearing whatever on the right of other persons to maintain them and to seek to persuade others of their validity. * * * No inference that any of the defendants knowingly and wilfully conspired as charged in the indictment, or intended to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from the advocacy or teaching of socialism or other economic or political or social doctrines, by reason of any unpopularity of such doctrines or by reason of any opinion you may hold with respect to whether such doctrines, or the opinions or beliefs of any of the defendants, are unreasonable, distasteful, absurd or hateful. * * * The defendants, in common with other persons living under our Constitution, have the right protected by the First Amendment to criticize our system of Government and the Government itself, even though the speaking or writing of such criticism may undermine confidence in the Government or cause or increase discontent. They have the right also to criticize the foreign policy of the United States and the role being played by this country in international affairs; and to praise the foreign policy of other governments and the role being played by those governments in international affairs. * * * The right of the defendants to enjoy such freedom of expression is unaffected by whether or not the opinions spoken or published may seem to you to be crudely intemperate, or to contain falsehoods, or to be designed to embarrass the Government. No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of

the United States by force and violence, or of intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from such expressions alone. * * * Therefore, activities such as membership or officership in the Communist Party, or organization of units of the Communist Party, or recruitment of members, or the circulation of books, articles, magazines and newspapers, or the writing of articles and directives, or the conducting of schools and classes, or going 'underground,' or the use of fictitious names, are not to be considered unless you are satisfied beyond a reasonable doubt from all the evidence in the case that any such activities of the defendants or any of them, as you may find, were carried on as means or methods in furtherance of an object or purpose of the conspiracy alleged in the indictment. * * * No statement or writing of any kind purporting to declare the principles or theories of the Communist Party, or on any other topic, may be imputed to the Communist Party merely because made by some member, leader or officer of the party, or a teacher of a party school or class, in the course of party activities. * * * The defendants are not being tried to determine what kind of people they are, or what sort of things they would be likely to do if allowed to remain at liberty. Rather it is your duty to determine whether the evidence establishes beyond a reasonable doubt that they did do in the past the things charged in the indictment. * * * As previously stated, the intent required to convict a defendant is not merely the intentional conspiracy to teach and advocate the necessity and duty of overthrowing and destroying the Government of the United States by force and violence. It must also appear beyond a

reasonable doubt from the evidence in the case that such defendant had the further specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

Defendants were convicted of something very different from the use of speech, assembly or publication.

AFFIRMED.

(Endorsed:) Opinion. Filed Mar. 17, 1955.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13,480

JUDGMENT

Appeals from the United States District Court for the Southern District of California, Central Division.

These causes came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and were duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED:) Judgment.

Filed and entered: March 17, 1955,

PAUL P. O'BRIEN, Clerk.

Appendix B

OPINIONS OF THE DISTRICT COURT.

U. S. v. Schneiderman, et al.

U. S. v. Spector, et al.

Numbers 21883 and 21940. Filed December 11, 1951, cited as 102 Fed. Supp. 87.

MATHES, District Judge.

It is charged in the indictment in each of these cases that the defendants conspired to commit offenses against the United States. 18 U.S.C. § 371. The offenses which the defendants stand accused of conspiring to commit are violations of the Smith Act. 54 Stat. 670 (1940); 18 U.S.C. (1946 ed.) § 10; 18 U.S.C. (1948 ed.) § 2385.

The material portions of the specific charges as laid in the indictments are in these words: "From and on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of California, and elsewhere, * * * the defendants herein, unlawfully, wilfully, and knowingly did conspire with each other and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to commit offenses against the United States prohibited by Section 2 of the Smith Act * * * by so conspiring (1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing the Government

of the United States by force and violence, and (2) unlawfully, wilfully, and knowingly to organize and help organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act * * *."

It is further charged in the indictments that, *inter alia:* "It was * * * a part of said conspiracy that said defendants and co-conspirators would write and cause to be written articles and directives in publications of the Communist Party of the United States of America including, but not limited to, 'Political Affairs,' 'Daily People's World,' 'Daily Worker,' and 'The Worker,' teaching and advocating the necessity of overthrowing and destroying the Government of the United States by force and violence;

"It was further a part of said conspiracy that said defendants and co-conspirators would conduct and cause to be conducted schools and classes * * * in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances permit * * *."

It is further charged that: "In pursuance of said conspiracy and to effect the objects thereof, the defendants and co-conspirators did commit, among others, * * * [fifteen overt acts] * * *."

The defendants have presented a joint motion to dismiss the two indictments upon several grounds, only

one of which requires discussion here. That ground is: "The indictments do not state facts sufficient to constitute offenses against the United States."

As a corollary to the ground just stated, the defendants argue that: "The indictments • • • by reason of their failure to set forth all necessary elements of the crime they purport to charge, deprive these defendants of their right, in a criminal prosecution, to be informed of the nature and cause of the accusation, in violation of the Sixth Amendment."

The defendants at bar stand accused of what appears to be in substance the same conspiracy of which Dennis and others were convicted in the Southern District of New York. See Dennis v. United States, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; id. 2 Cir., 1950, 183 F.2d 201; id. sub nom., United States v. Foster, D.C., S.D.N.Y. 1949, 9 F.R.D. 367, 374-375. Indeed the defendants in the Dennis case are charged as "co-conspirators but not defendants" in the indictments here. [A comparison of the allegations of the indictments at bar with those of the indictment in the Dennis case has been submitted by counsel for the defendants and is included as an appendix hereto.]

The gist of the conspiracy provisions of the indictments at bar is that the defendants and others "unlawfully, wilfully and knowingly did conspire • • • to commit offenses against the United States prohibited by Section 2 of the Smith Act • • • by so conspiring (1) unlawfully, wilfully and knowingly to advocate and teach • • • and (2) unlawfully, wilfully and knowingly to organize and help organize • • • in violation of Section 3 of the Smith Act • • •."

[1] As the Smith Act originally stood, § 3 prohibited a conspiracy to do "any of the acts" forbidden by the provisions of § 2, 54 Stat. 671 (1940). The Congress thus enacted in § 3 the old common law crime of conspiracy, which made the act of conspiring, without more, a public offense. Nash v. United States, 1913, 229 U.S. 373, 378, 33 S.Ct. 780, 57 L.Ed. 1232. Hence the doing of an overt act was not an essential element of the crime of conspiracy defined in § 3. See Dennis v. United States, supra, 341 U.S. at pages 574, 590, 71 S.Ct. 857.

[2] Sections 2 and 3 of the Smith Act later became §§ 10 and 11 of Title 18 of the United States Code, 54 Stat. 670 (1940). And when Title 18 of the United States Code was revised in 1948, the conspiracy section 3, 18 U.S.C. (1940 ed.) § 11, was repealed, 62 Stat. 867 (1948), leaving a conspiracy to commit the acts prohibited by § 2 of the Smith Act covered by the general conspiracy statute, 18 U.S.C. (1948 ed.) § 371, which does require as an essential element of the offense that an overt act be done "to effect the object of the conspiracy".

The defendants first direct attention to the last-above-quoted language of the indictments, namely, the allegations that they conspired "to commit offenses * * * prohibited by Section 2 of the Smith Act * * * by so conspiring * * * to advocate and teach * * *," as prohibited by § 2(a)(1), "and * * * to organize and help organize * * *," as prohibited by § 2(a)(3), "in violation of Section 3 of the Smith Act * * *." The substance of this, the defendants contend, is but to charge them with a conspiracy to commit a conspiracy. Cf. United States v. Armstrong, D.C., Ind.1920, 265 F.2d 683, 695.

The Government replies that the citation in the indictment of § 3 of the Smith Act is to be considered an error which, in keeping with Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., "shall not be ground for dismissal of the indictment", since the error has not misled the defendants to their prejudice. And the Government further urges that the language in question should be read as if the phrase "by so conspiring" consists of nothing more than the preposition "by," and as if the draftsman had employed the gerund or verbal noun rather than the infinitive of the verbs.

So read, the indictment charges that "the defendants * * * unlawfully, wilfully, and knowingly did conspire * * * to commit offenses * * * prohibited by Section 2 of the Smith Act * * * by * * * (1) unlawfully, wilfully, and knowingly" advocating and teaching "the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) [by] unlawfully, wilfully, and knowingly" organizing and helping to organize "as the Communist Party * * * persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence * * *."

But the defendants reply that even so reading the indictments, the essential elements of an offense are not charged. Specifically, the defendants assert that the requisite intent is not alleged.

The gravamen of the charge as laid in the indictments is that the defendants "unlawfully, wilfully, and knowingly did conspire * * * to commit offenses against the United States * * * by * * * unlawfully, wilfully and

knowingly" doing acts prohibited by § 2(a) (1) and § 2(a) (3) of the Smith Act.

[3] Since the adverb "unlawfully" is but a conclusion of the pleader that what was done was in violation of law cf. Keck v. United States, 1899, 172 U.S. 434, 437; 19 S.Ct. 254, 43 L.Ed. 505, the charge is of a conspiracy to commit offenses by doing precisely what is forbidden by the language of § 2(a) (1) and § 2(a) (3) of the Smith Act. See 54 Stat. 670, 671 (1940); 18 U.S.C. (1940 ed.) §10; id. (1948 ed.) § 2385.

Rule 7(c) of the Federal Rules of Criminal Procedure provides in part that: "The indictment • • • shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[4] "The general, and with few exceptions • • • the universal, rule, on this subject," said the Court in United States v. Hess, 1888, 124 U.S. 483, 486, 8 S. Ct. 571, 573, 31 L.Ed. 516, "is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

[5, 6] To repeat the classic quotation from the opinion of Mr. Chief Justice Waite in United States v. Cruikshank, 1875, 92 U.S. 542, 558, 23 L.Ed. 588. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself

of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

[7] However, as was said in Wong Tai v. United States, 1927, 273 U.S. 77, 80-81, 47 S.Ct. 300, 301, 71 L.Ed. 545: "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy • • •." See also Thornton v. United States, 1926, 271 U.S. 414, 423, 46 S.Ct. 585, 70 L.Ed. 1013; Williamson v. United States, 1908, 207 U.S. 425, 447-449, 28 S.Ct. 163, 52 L.Ed. 278.

[8] And where the language of the statute defining the offense charged is, "according to the natural import of the words, fully descriptive of the offense, then ordinarily it is sufficient" to charge a substantive offense by simply adopting or paraphrasing the words of the statute. Potter v. United States, 1894, 155 U.S. 438, 444, 15 S.Ct. 144, 146, 39 L.Ed. 214. Armour Packing Co. v. United States, 1908, 209 U.S. 56, 83-84, 28 S.Ct. 428, 52 L.Ed. 681.

[9] But as Mr. Justice Gray pointed out in United States v. Carll, 1881, 105 U.S. 611, 612-613, 26 L.Ed.

1135: "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In Ledbetter v. United States, 1898, 170 U.S. 606, 611-612, 18 S.Ct. 774, 776, 42 L.Ed. 1162, the court explained: "The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense * * *." See also United States v. Simmons, 1877, 96 U.S. 360, 362, 24 L.Ed. 819; United States v. Weber, D.C.N.D.Ill. 1947, 71 F.Supp. 88.

The gist of the first argument advanced by the defendants in support of their motions to dismiss is that "all of the elements necessary to constitute the offense intended to be punished" are not to be found in the language of the Smith Act; and since the indictments detail "in the words of the statute" the intended conduct by means of which the defendants purposed to commit the claimed offense they allegedly conspired to commit, an essential element of the charge is lacking.

[10] Specifically the defendants point to the fact that the language of the statute declares it to be an offense "knowingly or willfully" to engage in the proscribed

conduct. Whereas the Supreme Court was prompted to hold, in the light of the manifest purpose of the legislation and the inhibitions of the First Amendment, U.S. Const.Amend. I, "that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." See Dennis v. United States, supra, 1951, 341 U.S. at page 499, 71 S.Ct. 857, 862.

The Government urges on the other hand the charge that the defendants "unlawfully, wilfully, and knowingly did conspire * * * to commit offenses * * * prohibited by the Smith Act * * * by so conspiring (1) unlawfully, wilfully, and knowingly to advocate and teach * * *" is sufficient to constitute an allegation of the "essential element * * * of the intent" to accomplish the overthrow.

[11] It is true that intent "may always be averted in general terms". Evans v. United States, 1894, 153 U.S. 584, 594, 14 S.Ct. 934, 939, 38 L.Ed. 839. But the specific inquiry here is whether the phrase "unlawfully, wilfully, and knowingly" either denotes or connotes the specific intent which has been held to be an essential element of any offense against the Smith Act.

"Unlawfully" as noted before is but a conclusion which means nothing more than allegedly contrary to law. Cf. Bannon v. United States, 1895, 156 U.S. 464, 466-467, 15 S.Ct. 467, 39 L.Ed. 494; Davis v. Utah, 1894, 151 U.S. 262, 266, 14 S.Ct. 328, 38 L.Ed. 153.

[12] To act "knowingly" means to act voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason. See United States v. Murdock, 1933, 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381.

[13] As stated in United States v. Illinois Cent. R. Co., 1938, 303 U.S. 239, 242-243, 58 S.Ct. 533, 535, 82 L.Ed. 773: "'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

Hence, to act "wilfully" means to act not only voluntarily and purposely but also with specific intent to violate the law, or with reckless disregard as to whether or not the act is a violation of law. Hartzell v. United States, 1944, 322 U.S. 680, 686-687, 64 S.Ct. 1233, 88 L.Ed. 1534; Screws v. United States, 1945, 325 U.S. 91, 101-107, 65 S.Ct. 1031, 89 L.Ed. 1495.

[14] If a conspiracy to bring about overthrow of the Government by force and violence were charged in the indictments at bar, it would be sufficient to allege that such a conspiracy was willful. Schenck v. United States, 1919, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; Hartzell v. United States, supra, 322 U.S. at pages 681, 686-687, 690, 691, 64 S.Ct. 1233. Indeed the mere allegation that the defendants conspired to commit the offense would denote wilfullness. Frohwerk v. United States, 1919, 249 U.S. 204, 208, 39 S.Ct. 249, 63 L.Ed. 561.

Here, however, the charge is of a conspiracy "• • • wilfully • • • to advocate and teach • • • and wilfully • • • to organize and help organize • • •." And it is urged the allegation that "the defendants • • • wilfully • • • did conspire • • • to commit offenses • • • prohibited by • • • the Smith Act • • •" is sufficient to carry with it every allegation of intent necessary to constitute the substantive offense.

[15] Where a conspiracy to commit an offense is charged, observed Mr. Chief Justice White (then As-

sociate Justice) in Williamson v. United States, supra, 207 U.S. at page 447, 28 S.Ct. at page 171, "the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy." To the same effect, see Wong Tai v. United States, supra, 273 U.S. at page 81, 47 S.Ct. 300; and see Dennis v. United States, supra, 341 U.S. at pages 572-577, 71 S.Ct. 857.

Assuming then that the indictments here would be sufficient if the charge omitted all mention of the conduct by which, as well as the state of mind with which, the alleged conspirators purposed "to commit offenses * * * prohibited by Section 2 of the Smith Act," the fact is the draftsman did not choose to do so. Instead he chose to "descend to particulars", United States v. Cruikshank, supra, 92 U.S. at page 558, 23 L.Ed. 588, and allege in the language of the statute the means—both act and intent—whereby the alleged conspirators purposed "to commit offenses against the United States."

The result is the charge that the defendants conspired to commit the alleged offenses against the United States by means of (1) wilfully advocating and teaching, and by means of (2) wilfully organizing and helping to organize. Yet in Dennis v. United States, supra, 341 U.S. at pages 499, 509-511, 71 S.Ct. 857, it appears to have been expressly held that conduct proscribed by § 2 of the Smith Act which impinges upon freedom of speech, even though willful, cannot constitute an offense against the United States unless the acts be done with the specific intent to overthrow the Government by force and violence.

It is pointed out, however, that the indictment in the Dennis case, see id. sub nom. United States v. Foster, supra, D.C., 9 F.R.D. at pages 374-375, does not contain any allegation of intent to overthrow, which the Supreme Court characterized "as an essential element of the crime". See Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, 862. From that fact it is argued the court impliedly held that inclusion of such allegation is not essential to sufficiency of the indictment.

The question of failure of the indictment in the Dennis case to allege requisite intent was raised by the defense in the Court of Appeals, and the opinion there states "it is patent on the merest inspection that the indictment is sufficient". United States v. Dennis, supra, 2 Cir., 183 F. 2d at pages 207, 214-215. The question was also presented to the Supreme Court upon petition for certiorari, but the court expressly limited the scope of the writ to constitutional questions. Dennis v. United States, supra, 341 U.S. at pages 495-496, 71 S.Ct. 857. The Government nevertheless urges that "the Supreme Court necessarily had to pass on the sufficiency of the indictment" and "would have raised this issue *sua sponte* even though it had not been briefed."

The Government also points to the fact that the opinion states: "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow." Id. 341 U.S. at page 499, 71 S.Ct. at page 862.

It is true of course that "failure of the indictment * * * to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Fed. R. Crim. P. 12(b)(2). And the court would customarily pass upon that question before reaching constitutional issues. Cf. United States v. C.I.O., 1948, 335 U.S. 106, 110, 68 S.Ct. 1349, 92 L.Ed. 1849.

In the Dennis case, however, the Government urged upon appeal that because of arguments made and instructions requested by the defense, "they are in no position to claim that they were not fully advised of the element of specific intent in the charges brought against them."

In these circumstances the Court may well have concluded that any defect as to the allegations of intent in the indictment in the Dennis case did not "affect substantial rights" of the defendants, and for that reason should be "disregarded" in keeping with the mandate of Rule 52(a) of the Federal Rules of Criminal Procedure. See Rosen v. United States, 1896, 161 U.S. 29, 33-34, 41, 16 S.Ct. 434, 480, 40 L.Ed. 606; Price v. United States, 1897, 165 U.S. 311, 314-315, 17 S.Ct. 366, 41 L.Ed. 727; Gora v. Hawaii, 9 Cir., 1946, 152 F.2d 933, 935, certiorari denied, 1946, 328 U.S. 862, 66 S.Ct. 1362, 90 L.Ed. 1632; cf. United States v. Staats, 1850, 8 How. 41, 49 U.S. 41, 44, 12 L.Ed. 979.

[16] To hold then that "wilfully," as employed in the Smith Act and in the indictments at bar, denotes an "intent * * * to overthrow the Government by force and violence". Dennis v. United States, supra, 341 U.S. at

page 499, 71 S.Ct. at page 862, would seem to expand unduly the content of that already overworked adverb. Cf. Williams v. United States, 1951, 341 U.S. 97, 101, 71 S.Ct. 576, 95 L.Ed. 774; American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 413, 70 S.Ct. 764, 94 L.Ed. 925; Screws v. United States, supra, 325 U.S. at pages 101-107, 65 S.Ct. 1031; United States v. Ragen, 1942, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383; Omaechevarria v. Idaho, 1918, 246 U.S. 343, 348, 38 S.Ct. 323, 62 L.Ed. 763. Moreover, it could not reasonably be held that "wilfully" even so much as connotes the necessary time element—intent to cause forcible and violent overthrow "as soon as circumstances permit." See Dennis v. United States, 341 U.S. at page 518, 71 S.Ct. at page 872.

Corollary to the argument that the indictments omit to charge requisite intent, the defendants contend that: "The indictment fails to state an offense, in that it fails to allege facts disclosing a 'clear and present danger' from the defendants."

The defendants point to their unquestioned constitutional right "to be informed of the nature and cause of the accusation" against them, U.S.Const. Amend. VI, and the declaration in Foster v. United States, 9 Cir., 1918, 253 F. 481, 482: "To furnish them with that information it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general. * * * Here the statute is very general in its terms, and the indictment merely charges in the language of the statute."

And the defendants further cite Fontana v. United States, 8 Cir., 1919, 262 F. 283, 288 where the court said: "It is an elementary rule of criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime." See also United States v. Korner, D.C.S.D.Cal. 1944, 56 F.Supp. 242.

It was in Schenck v. United States, supra, 1919, 249 U.S. 47, 52, 39 S.Ct. 247, 249—which, like the Foster and Fontana cases just cited was a prosecution under the Espionage Act of 1917, 40 Stat. 217 (1917)—that the "clear and present danger" rule was announced in these words: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

"This is a rule of reason", wrote Mr. Justice Brandeis with the concurrence of Mr. Justice Holmes in Schaefer v. United States, 1920, 251 U.S. 466, 482-483, 40 S.Ct. 259, 264, 64 L.Ed. 360. And he added: "Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities."

[17] Rules of law expressed in the most absolute terms are always subject to such exceptions as are dictated by reason. See Dennis v. United States, supra, 341 U.S. at pages 524-525, 538-539, 71 S.Ct. 857. Our common-law system of justice is founded upon the idea that "reason, not arbitrary will, is to be the ultimate ground of decision." Pound, The Spirit of the Common Law, 1921, 182-183.

[18] The unqualified declaration in the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" has never been literally enforced. Robertson v. Baldwin, 1897, 165 U.S. 275, 281, 17 S.Ct. 326, 41 L.Ed. 715; Gompers v. United States, 1914, 233 U.S. 604, 610, 34 S.Ct. 693, 58 L.Ed. 1115. The right to speak and the right to print, like all legal rights under our system, are accompanied always by correlative legal duties to exercise those rights reasonably under the circumstances, and hence are subject to reasonable abridgements or restraints.

But we so prize freedom of expression—indeed deem it so essential to the maintenance of "a government of laws and not of men". See Abrams v. United States, 1919, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173; Dennis v. United States, supra, 341 U.S. at pages 544-546, 71 S.Ct. 857, that the bounds of restraint upon speech and press which will be tolerated as reasonable are narrow in the extreme. That narrowness is sought to be expressed in terms of a definite standard in the "clear and present danger" rule. To borrow the words of Mr. Justice Holmes in Abrams v. United States, supra, 250 U.S. at pages 630-631, 40 S.Ct. at page 22: "Only the emergency that makes

it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law * * * abridging the freedom of speech.' "

[19] It is within the bounds of reasonable abridgement of freedom of expression, as Mr. Chief Justice Hughes said in Near v. Minnesota, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 that: "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."

The learned justice who coined the "clear and present danger" phrase, also declared in Abrams v. United States, supra, 250 U.S. at page 627, 40 S.Ct. at page 21: "I do not doubt for a moment that * * * the United States constitutionally may punish speech that * * * is intended to produce a clear and imminent danger * * *." To the same effect, see Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; see also Chafee, Free Speech in the United States, 1941, 129-135; Richardson, Freedom of Expression and the Function of Courts, 1951, 65 Harv.L.Rev. 1.

[20] In the cases at bar, the "clear" danger envisioned in the Smith Act is the act of engaging in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of government by means of force or violence. Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857.

The "present" danger consists in the specific intent of advocate or teacher to accomplish the objective of forcible overthrow as speedily as possible. Id. 341 at pages 508-511, 71 S.Ct. 857.

The indictments here are clearly sufficient to comply with the constitutional requirement that the accused "be informed of the nature * * * of the accusation". U.S. Const. Amend. VI. So the burden of this phase of the argument must be that while the "nature" of the accusation may be known from the face of the indictment, the "cause" cannot be, since for all that appears the defendants could not be constitutionally prevented from expressing their beliefs in the form and manner and by the means alleged in the indictments.

To state it differently, the indictments charge that the defendants conspired to commit offenses against the United States by doing what the language of the statute forbids, and the Supreme Court has held in the Dennis case that in the face of the prohibitions of the First Amendment, such acts cannot be held to constitute an offense against the United States unless done with the intent to bring about overthrow of the Government by force and violence "as speedily as circumstances would permit." See Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, 862. Which appears to be but another way of saying that, while the facts as alleged may sufficiently disclose a "clear" danger of "bringing about the evil within the power of Congress to punish" [id. 341 at page 509, 71 S.Ct. at page 867], nothing at all is alleged in the indictments to charge that the "clear" danger is also a "present" one.

The Government's reply to these suggestions is that the adverb "wilfully" as used in § 2 of the Smith Act has been construed in the Dennis case to mean with "the intent * * * to overthrow the Government by force and violence." [Id. at pages 499-500, 71 S.Ct. at page 862].

Assuming such to be the content of "wilfully" as used in the Smith Act, that meaning can only serve to charge a "clear" danger, and the element of "present" danger is still missing from the indictments. Cf. Hartzell v. United States, supra, 322 U.S. at pages 686-687, 64 S.Ct. 1233.

It may well be, as the Government urges, the Dennis case should be interpreted as holding that "wilfully," as used in § 2 of the Act, denotes "with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit." See Dennis v. United States, supra, at pages 512, 499-500, 518, 71 S.Ct. at page 868.

But to import that language into these indictments by expanding the content of "wilfully" is to adopt a device for which there is but doubtful warrant; especially in face of the omission from the charging clauses of the indictments of any allegation suggesting the phrase "as speedily as circumstances * * * permit", and the inclusion of that time phrase in the latter portion of the indictments where it is alleged what the "schools and classes" would teach and advocate as a "further * * * part of said conspiracy."

Moreover, faced as we are in these cases with a long and expensive trial, it would seem rash to resolve this doubt in favor of the Government, and particularly so when it is recalled that the charging portions of the indictments contain an admittedly ambiguous sentence structure and an admittedly erroneous statutory citation.

[21, 22] For the reasons stated, caution added to grave doubt—*abundans cautela non nocet*—prompts the holding that the indictments do not allege the intent essential

to charge that the means claimed to be employed by the conspirators would, if pursued, constitute any criminal offense against the United States. "Conviction upon a charge not made would be sheer denial of due process." De Jonge v. Oregon, 1937, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278.

[23] Accordingly the motions of the defendants to dismiss the indictments will be granted. However, in view of the Government's contentions that the indictments as now drafted do in effect contain these allegations of requisite intent, and in view of the representations made at the bar that the prosecution expects to prove the defendants acted with this specific intent, the court will proceed upon the assumption that all defects in the existing indictments will be promptly cured.

Rule 12(b) (5) of the Federal Rules of Criminal Procedure provides in part: "If the court grants a motion based on a defect * * * in the indictment * * * it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment * * *."

Hence the court will order that the bail of each of the defendants who may be at liberty on bail be continued, and that each of the defendants in both cases, who may be in custody in default of bail, be held in custody, pursuant to Fed.R.Crim.P. 12(b) (5), for a period of ten days from this date pending the filing of a new indictment in each case.

Counsel for defendants will prepare and settle under local rule 7 within five days formal orders embodying the rulings herein made.

Appendix

A Comparison of the Indictments In Cases of Dennis, et al. and Schneiderman, et al.

Dennis Indictment:

The Grand Jury charges:

1. That from on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg, the defendants herein, unlawfully, wilfully, and knowingly, did conspire with each other, and with divers other persons to the Grand Jurors unknown, to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the

Schneiderman indictment:

The Grand Jury charges:

1. From and on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of California, and elsewhere, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Philip Marshall Connelly, Rose Chernin Kusnitz, Al Richmond, also known as Abraham Richman, Ernest Otto Fox, also known as Ernest Otto Fuchs, Henry Steinberg, Loretta Starvus Stack, and Mary Bernadette Doyle, the defendants herein, unlawfully, wilfully and knowingly did conspire with each other *and with William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, co-conspirators but not defendants herein,* and with divers other persons to the grand jury unknown, *to commit offenses against the United States prohibited by Section 2*

United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940 (Section *10*, Title 18, United States Code), commonly known as the Smith Act..

(Note: order of stating the two objectives of conspiracy is reversed.)

of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) 10, and 18 U.S.C. (1948 Ed.) 2385, by so conspiring (1) *unlawfully*, wilfully and knowingly to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) unlawfully, wilfully, and knowingly to organize *and help organize* as the Communist Party of the United States of America a society, group, and assembly of persons who teac' and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 Ed.) *11*, and 18 U.S.C. (1948 Ed.) *371;*

2. It was part of said conspiracy that defendants would convene, in the Southern District of New York, a meeting of the National Board of the Communist Political Association on or about June 2, 1945, to adopt a draft resolution for the purpose of bringing about the dissolution of the Communist Political Association, and for the purpose of organizing as the Communist Party of the United States of America a society, group, and assembly of persons dedicated to the Marxist-Leninist principles of the overthrow and destruction of

(no corresponding allegation)

the United States by force and violence.

3. It was further a part of said conspiracy that said defendants would thereafter convene, in the Southern District of New York, a meeting of the National Committee of the Communist Political Association on or about June 18, 1945, to amend and adopt said draft resolution.

(no corresponding allegation)

4. It was further a part of said conspiracy that said defendants would thereafter cause to be convened, in the Southern District of New York, a special National Convention of the Communist Political Association on or about July 26, 1945, for the purpose of considering and acting upon said resolution as amended.

(no corresponding allegation)

5. It was further a part of said conspiracy that said defendants would induce the delegates to said National Convention to dissolve the Communist Political Association.

(no corresponding allegation)

6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence,

(No corresponding allegation, except as covered by paragraph (1))

and would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism.

7. It was further a part of said conspiracy that said defendants *would bring about the election of officers and the election of a National Committee of said Party, and be elected as officers and as members of said National Committee and the National Board of said Committee,* and in such capacities said defendants would assume leadership of said Party and responsibility for its policies and activities, *and would meet from time to time to formulate, supervise and carry out the policies and activities of said Party.*

8. It was further a part of said conspiracy that said defendants would cause to be organized Clubs, and District and State units of said Party, and would recruit and encourage the recruitment of members of said party.

9. It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated, books,

(2) It was part of said conspiracy that said defendants and co-conspirators would become *members,* officers, and functionaries of *said Party, knowing the purposes of the Party,* and in such capacities would assume leadership in said Party and responsibility for *carrying out* its policies and activities *up to and including the date of the filing of this indictment;*

(3) It was further part of said conspiracy that said defendants and co-conspirators would cause to be organized *Groups,* Clubs, *Sections,* District and State Units of said Party *in the State of California and elsewhere* and would recruit and encourage recruitment of members of said Party, *concentrating on recruiting persons employed in key basic industries and plants;*

(4) It was further a part of said conspiracy that said defendants and co-conspirators would publish and circulate and cause to be published and

articles, magazines, and newspapers advocating *the principles of Marxism-Leninism.*

circulated books, articles, magazines, and newspapers *teaching* and advocating *the duty and necessity of overthrowing and destroying the Government of the United States by force and violence;*

(No corresponding allegation)

(5) It was further a part of said conspiracy that said defendants and co-conspirators would write and cause to be written articles and directives in publications of the Communist Party of the United States of America, including, but not limited to, "Political Affairs," "Daily People's World," "Daily Worker," and "The Worker," teaching and advocating the necessity of overthrowing the Government of the United States by force and violence;

10. It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for *the study of* the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

(6) It was further a part of said conspiracy that said defendants would conduct and cause to be conducted schools and classes for *indoctrination of recruits and members of said Party* in the principles of Marxism-Leninism in which would be taught and advocated the duty and necessity of overthrowing the Government of the United States by force and violence *as speedily as circumstances permit;*

(No corresponding allegation)

(7) It was further a part of said conspiracy that said defendants and co-conspirators would agree upon and carry

into effect detailed plans for the vital parts of the Communist Party of the United States of America to go underground in the event of emergency and from said underground position to continue in all respect the conspiracy described in paragraph (1);

(No corresponding allegation)

(8) It was further a part of said conspiracy that said defendants and co-conspirators would use false names, passports, and other false documents in order to conceal their identies and activities as members and functionaries of said Party;

(No corresponding allegation)

(9) It was further a part of said conspiracy that defendants and co-conspirators would do other and further things to conceal the existence and operations of said conspiracy; and

In pursuance of said conspiracy and to effect the objects thereof in the Southern District of California, the defendants and co-conspirators did commit, among others, the following

Overt Acts:

(No overt acts)

1. On or about July 17 and 18, 1948, William Schneiderman, Dorothy Rosenblum Healey, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Al Richmond, also known as Abraham Richman, Loretta Starvus Stack, and

Mary Bernadette Doyle, defendants herein did attend and participate in a Convention of the Communist Party of the State of California at Park Manor, Sixth Street and Western Avenue, Los Angeles, California;

2. On or about August 20, 1948, Mary Bernadette Doyle, a defendant herein did attend and participate in a meeting of the Morgan Hull Club in San Diego, California;

3. On or about August 21, 1948, Loretta Starvus Stack, a defendant herein, did prepare and issue a directive and cause it to be circulated by the California State Committee of the Communist Party;

(No overt acts)

4. On or about August 21, 1948, Al Richmond, also known as Abraham Richman, a defendant herein, did issue a directive and cause it to be circulated by the California State Committee of the Communist Party;

5. On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting;

6. On or about May 20, 1949, Rose Chernin Kusnitz, a defendant herein, did attend and participate in a meeting held at 847 South Grand Avenue, Los Angeles, California.

7. On or about December 7, 1949, William Schneiderman and Dorothy Rosenblum Healey, defendants herein, did attend and participate in a meeting at Park View Manor, 2200 West Seventh Street, Los Angeles, California;

8. On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California;

9. On or about February 15, 1950, Mary Bernadette Doyle, a defendant herein, did attend and participate in a meeting held at 7891 Normandie Street, San Diego, California;

10. On or about April 6, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at 3875 City Terrace Boulevard, Los Angeles, California;

11. On or about June 12, 1950, Albert Jason Lima, a defendant herein, did attend and participate in a meeting at 2200 West Seventh Street, Los Angeles, California;

(No overt acts)

12. On or about June 24, 1950, Philip Marshall Connelly, Mary Bernadette Doyle, and Albert Jason Lima, defendants herein, did attend and participate in a meeting at Park

Manor, 607 South Western Avenue, Los Angeles, California;

13. On or about November, 1950, Ernest Otto Fox, also known as Ernest Otto Fuchs, did prepare and issue a directive and cause it to be circulated;

14. On or about April 9, 1951, Carl Rude Lambert, a defendant herein, did attend and participate in a meeting at 405 De La Guerra Street, Santa Barbara, California;

15. On or about July 24, 1951, Oleta O'Connor Yates, a defendant herein, did attend and participate in a meeting at 124 West Sixth Street, Los Angeles, California.

(No such conclusion, except as covered by paragraph (1))

In violation of Sections 3 and 5 of the Act of June 28, 1940 (Sections 11 and 13, Title 18, United States Code), commonly known as the Smith Act.

A True Bill

Jerome S. Blumauer
Acting Foreman

John F. X. McGohey
United States Attorney

A True Bill

Robert B. Young
Foreman

Ernest A. Tolin
United States Attorney

U. S. v. Schneiderman, et al., No. 21940.

Filed April 23, 1952 nunc pro tunc January 11, 1952, cited as 104 Fed. Supp. 405.

MATHES, District Judge.

Defendants, fifteen in number, stand charged with conspiracy to commit offenses against the United States, 18 U.S.C. § 371 prohibited by the Smith Act, 54 Stat. 670, Act June 28, 1940, 18 U.S.C. (1946 ed.) § 10, 18 U.S.C. (1948 ed.) § 2385, "by • • • advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence • • •."

In preparing their defense to that indictment defendants have caused the Clerk to issue a subpoena duces tecum pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., directing plaintiff and the United States Attorney to bring to the trial

> "All documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by the Grand Jury or Grand Juries which returned indictments herein, and (b) in the course of the Government's preparation for the trial of these causes, if such books, papers, documents and objects, (a) have been presented to the Grand Jury or Grand Juries; or (b) are to be offered as evidence on the trial of the defendants herein, or any of them, under said indictments."

Defendants have also filed a motion pursuant to Rule 17(c) for "an order fixing a time and place prior to the

trial * * * for the production and inspection of the * * * documentary evidence'' described in the subpoena duces tecum.

The Government has countered with a motion to modify the subpoena upon the ground inter alia that ''compliance would be unreasonable'' within the meaning of Rule 17(c). Specifically, the Government moves to modify the subpoena to such extent as may be necessary to provide ''adequate safeguards * * * to protect against disclosure of the identity of informants * * *.''

It is conceded that the United States Attorney has permitted the defense to inspect without contest a large number of documents. Indeed the Government contends it has now responded fully to the subpoena duces tecum, by permitting inspection of all except writings ''which cannot now be identified without danger of disclosing the identity of confidential informants * * * [and] documents intended for use as impeaching or rebuttal documents.''

The court has ordered these excepted writings delivered under seal to the judge for examination *in camera* cf. United States v. De Normand, 2 Cir., 1945, 149 F.2d 622, 625, certiorari denied, 1945, 326 U.S. 756, 66 S.Ct. 89, 90 L.Ed. 454; Id., 1947, 330 U.S. 822; 67 S.Ct. 769, 91 L.Ed. 1272; United States v. Cohen, 2 Cir., 1945, 148 F.2d 94, certiorari denied, 1945, 325 U.S. 852, 65 S.Ct. 1087, 89 L.Ed. 1972; United States v. Ebeling, 2 Cir., 1944, 146 F.2d 254, 257, and the questions now for determination are (1) whether defendants' motion for inspection in advance of trial should be granted as to the writings in dispute and (2) whether the subpoena duces tecum should be modified to the extent requested.

It is to be noted, as counsel for defense points out, "no claim is made * * * that the documents in question involve any state secrets [cf. 8 Wigmore, Evidence § 2378 (3d ed. 1940)], defense information or matters affecting the national security" cf. Zimmerman v. Poindexter, D.C.Hawaii, 1947, 74 F.Supp. 933. Nor is inspection sought to be denied by reason of any executive or administrative regulation or order, see Touhy v. Ragen, 1951, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417; Boske v. Comingore, 1900, 177 U.S. 459, 20 S.Ct. 701, 44 L.Ed. 846; Ex Parte Sackett, 9 Cir., 1935, 74 F.2d 922.

The Government invokes here the public policy favoring protection from disclosure of the identity of one who serves as an informer to law enforcement officials. See Scher v. United States, 1938, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151; Vogel v. Gruaz, 1884, 110 U.S. 311, 316, 4 S.Ct. 12, 28 L.Ed. 158; 8 Wigmore, Evidence § 2374, 3d ed. 1940. But the "confidential informants," whose identity inspection of the disputed writings might disclose, are persons who may have testified before the grand jury which returned the indictment and will probably be called at the trial to lay evidentiary foundation for introduction of the documents. Thus they promise ultimately to become "something more" than mere informers. Cf. Sorrentino v. United States, 9 Cir., 1947, 163 F.2d 627; Wilson v. United States, 3 Cir., 1932, 59 F.2d 390. And of course their "confidential" character cannot survive their expected appearance as witnesses at the trial.

Defendants urge that in these circumstances they are entitled as of right to inspect the documents in question under the authority of Bowman Dairy Co. v. United

States, 1951, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879, since the subpoena at bar is "in the precise form and content" of the subpoena involved there. Such an interpretation of the opinion in that case would enlarge the holding as to what is "subject to subpoena" into a holding as to what may be inspected prior to trial.

In the Bowman opinion, after pointing out that Rule 16 of the Federal Rules of Criminal Procedure provides "a limited right of discovery," the Court declares that: "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. * * * Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." Id. 341 U.S. at page 220, 71 S.Ct. at page 679.

As observed in the opinion of the Court of Appeals, Id., 7 Cir., 1950, 185 F.2d 159, 162-163: "The history of the development of Rule 16 shows that the limitations appearing therein were deliberately inserted." Furthermore, the notes of the Advisory Committee appended to Rule 16, 18 U.S.C.A. p. 224 state that even with respect to the limited discovery therein provided: "The entire matter is left within the discretion of the court." See United States v. Schiller, 2 Cir., 1951, 187 F.2d 572, 575.

What a defendant may move to "inspect and copy or photograph" pursuant to Rule 16 is expressly limited to material "obtained from or belonging to the defendant or obtained from others by seizure or by process," and

such inspection is conditioned *ex vi termini* "upon a showing that the items sought may be material to the preparation of * * * defense and that the request is reasonable." What additional material may be subjected to a defendant's inspection prior to trial depends upon proper interpretation of the last sentence of Rule 17(c): "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

The sentence just quoted appeared in the preliminary draft of the rules as the last sentence of proposed Rule 20(b), and the appended note of the Advisory Committee explains: "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the interests of fairness and for the purpose of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed." Federal Rules of Criminal Procedure —Preliminary Draft pp. 104-105, 107-108 (1943).

[1] It seems clear then that whether materials subject to subpoena are to be produced and inspected prior to trial rests within the discretion of the trial court. Adopting a characterization from Mr. Chief Justice Marshall, defendants' motion to inspect is addressed "to the discretion of the court * * * not to its inclination,

but to its judgment; and its judgment is to be guided by sound legal principles." United States v. Burr, C.C.Va., 1807, 25 Fed.Cas. pages 30, 35, No. 14,692 d.

[2, 3] Proper exercise of discretion in dealing with the problem here requires that the public policy favoring protection of the identity of informers be weighed against the defendants' interest in an inspection of the documents preparatory to trial. See Langnes v. Green, 1931, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520; Dixie Cup Co. v. Paper Container Mfg. Co., 7 Cir., 1949, 174 F.2d 834, 836, certiorari denied, 1949, 338 U.S. 867, 70 S.Ct. 142, 94 L.Ed. 531. This involves a balancing of the inconvenience of disclosure in advance of trial against the inconvenience of preparing the defense without benefit of inspection. Cf. Shores v. United States, 8 Cir., 1949, 174 F.2d 838, 844-845. The latter factor is to be measured largely by an appraisal of the probative value of the writings—what inspection in advance of trial might mean to preparation of defense.

[4] Documents such as purported Communist Party membership cards would furnish scant aid to preparation of defense, other than to supply a partial list of intended prosecution witnesses. But only persons "charged with treason or other capital offense" are entitled as of right to be furnished "before commencement of trial" with names of "the witnesses to be produced on the trial for proving the indictment". 18 U.S.C. § 3432; Wayne v. United States, 8 Cir., 1943, 138 F.2d 1, certiorari denied, 1944, 320 U.S. 800, 64 S.Ct. 429, 88 L.Ed. 483; Jones v. United States, 9 Cir., 1908, 162 F. 417, 420, certiorari denied, 1908, 212 U.S. 576, 29 S.Ct. 685, 53 L.Ed. 657; United States v. General Petroleum Corp., D.C.S.D.Cal.

1940, 33 F.Supp. 95, 99; United States v. Pierce, D.C.N.D.N.Y.1917, 245 F. 888, 890.

Defendants press the fact, however, that the "documentary evidence, allegedly identifying the informant * * * has concededly been presented to the grand jury or will be offered into evidence at the trial * * * where disclosure of the identity of the informant will be made * * * in order to lay the foundation for the introduction of the document."

[5] Even if the informants were certain to be called as prosecution witnesses and their identities thus necessarily disclosed as defendants say "in a comparatively short period of time," it is my opinion that the public policy favoring protection of identity should operate to prevent disclosure prior to the time when the informer becomes witness. Ample basis in reason for this holding exists in the fact that the Government may finally elect not to use a given document rather than reveal the identity of the informer. See United States v. Coplon, 2 Cir., 1950, 185 F.2d 629, 638-639; United States v. Krulewitch, 2 Cir., 1944, 145 F.2d 76, 78-79, 156 A.L.R. 337; United States v. Andolschek, 2 Cir., 1944, 142 F.2d 503, 506.

[6] Moreover, the public policy under discussion only forbids non-essential disclosure. Disclosure may always be compelled in cases where identity of the informer appears "essential to the defense". Scher v. United States, supra, 305 U.S. at page 254, 59 S.Ct. at page 176; cf. United States v. Coplon, supra, 185 F.2d at pages 638-639; United States v. Grayson, 2 Cir., 1948, 166 F.2d 863, 870; Sorrentino v. United States, supra, 163 F.2d at page 627; United States v. Beekman, 2 Cir., 1946, 155 F.2d 580, 584; United States v. Andolschek, supra, 142

F.2d at page 506; Wilson v. United States, supra, 59 F.2d at page 392.

[7] Necessarily, then, denial of pretrial inspection does not preclude further applications for inspection during the course of the trial. See Shores v. United States, supra, 174 F.2d at page 844; United States v. Schiller, supra, 187 F.2d at page 575; cf. United States v. Krulewitch, supra, 145 F.2d at page 78.

[8] Furthermore, since defendants may not, as a matter of right, compel disclosure of the Government's evidence in advance of the trial, Goldman v. United States, 1942, 316 U.S. 129, 132, 62 S.Ct. 993, 86 L.Ed. 1322; United States v. Kushner, 2 Cir., 1943, 135 F.2d 668, 673, certiorari denied, 1943, 320 U.S. 212, 63 S.Ct. 1449, 87 L.Ed. 1850; United States v. Greater Kansas City, etc., Ass'n, D.C.W.D.Mo.1949, 85 F.Supp. 503, 512; United States v. Foster, D.C.S.D.N.Y.1948, 80 F.Supp. 479, 486, the court will take appropriate measures within judicial discretion to protect the rights of the defense in event of undue surprise. See Rubio v. United States, 9 Cir., 1927, 22 F.2d 766, 767-768, certiorari denied, 1928, 276 U.S. 619, 48 S.Ct. 213, 72 L.Ed. 734.

"Discretion" to borrow the language of Mr. Justice Sutherland, "denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily * * * but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green, supra, 282 U.S. at page 541, 51 S.Ct. at page 247.

[9] What has been said deals with pretrial inspection of writings intended "to be offered in evidence on the trial of the defendants." As to writings not to be used at the trial but which "have been presented to the Grand Jury," the policy against non-essential disclosure of informants is buttressed by the equally strong public policy favoring secrecy of grand jury proceedings. Goodman v. United States, 9 Cir., 1939, 108 F.2d 516, 519, 127 A.L.R. 265; In re Charge to Grand Jury, C.C.Cal.1872, 30 Fed.Cas. 992, 995, No. 18,255; United States v. American Medical Ass'n, D.C.D.C.1939, 26 F.Supp. 429, 430; United States v. Amazon Industrial Chemical Corp., D.C.Md.1931, 55 F.2d 254, 261.

[10, 11] As to writings intended to be used by the prosecution for rebuttal or impeachment purposes, there appears no good reason for pre-trial inspection. Such documents could not *ex natura rei* aid preparation of the defendants' case other than in a negative way. "The function of rebuttal", as the court observed in United States v. Crowe, 7 Cir., 1951, 188 F.2d 209, 213, "is to explain, repel, counteract or disprove adversary's evidence." And evidence introduced to impeach a witness is ordinarily limited to that purpose. Kemp v. Government of Canal Zone, 5 Cir., 1948, 167 F.2d 938, 940; United States v. Angelo, 3 Cir., 1946, 153 F.2d 247, 250-251; United States v. Graham, 2 Cir., 1939, 102 F.2d 436, 442, certiorari denied, 1939, 307 U.S. 643, 59 S.Ct. 1041, 83 L.Ed. 1524; Merrill v. United States, 9 Cir., 1925, 6 F.2d 120, 121.

It is to be remembered also that the prosecution cannot determine, until the defense has introduced witnesses and evidence, what if any rebuttal or impeachment will be

called for. Hence writings relating to possible rebuttal or impeachment are essentially in an area where the surprise element is unavoidable; and, moreover, desirable as a force tending to keep both sides within the narrow confines of the truth. See: The Practical Operation of Federal Discovery, 1952, 12 F.R.D. 131, 156-157; 3 Wharton, Criminal Evidence, pp. 2219-2222 (11th Ed. 1935); cf. Arnstein v. United States, 1924, 54 App.D.C. 199, 296 Fed. 946, 950, certiorari denied, 1924, 264 U.S. 595, 44 S.Ct. 454, 68 L.Ed. 867.

[12] The considerations just mentioned bespeak the soundness of the conclusion that avoidance of pitfalls in impeachment or rebuttal is not an end which pre-trial discovery is purposed to further. See Hickman v. Taylor, 1947, 329 U.S. 495, 507-508, 511-513, 519, 67 S.Ct. 385, 91 L.Ed. 451; Carpenter v. Winn, 1911, 221 U.S. 533, 541, 545, 31 S.Ct. 683, 55 L.Ed. 842; Alltmont v. United States, 3 Cir., 1950, 177 F.2d 971, 978, certiorari denied, 1950, 339 U.S. 967, 70 S.Ct. 999, 94 L.Ed. 1375; United States v. Rosenfeld, 2d Cir., 1932, 57 F.2d 74, 77, certiorari denied sub nom. Nachman v. United States, 1932, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290.

[13] For the above reasons, defendants' motion to inspect documentary evidence prior to trial will be granted as to Government's exhibits numbered for identification 1 to 214 inclusive; and denied as to Government's exhibits numbered for identification 215 to 251 inclusive. Plaintiff's motion to modify the subpoena duces tecum will be granted as to Government's exhibits numbered for identification 215 to 251 inclusive.

[14] All exhibits withheld from inspection and not offered in evidence at the trial shall be sealed by plaintiff

and filed with the Clerk, and shall remain secret under seal pending further order of court. Any exhibits so withheld and sealed shall, upon application of any defendant, be made part of any record on appeal in this cause for inspection *in camera* by the Court of Appeals, to enable the appellate court to determine whether inspection has been erroneously withheld. Cf. United States v. De Normand, supra, 149 F.2d at page 625.

U. S. v. Schneiderman, et al., No. 21940.

Filed May 6, 1952, cited as 106 Fed. Supp. 731.

MATHES, District Judge.

Defendants are on trial by jury under an indictment charging conspiracy, 18 U.S.C. § 371, to commit offenses against the United States prohibited by the Smith Act, 54 Stat. 670, Act June 28, 1940, 18 U.S.C.(1946 ed.) § 10, 18 U.S.C.(1948 ed.) § 2385, "by * * * organizing and helping to organize, as the Communist Party of the United States of America a * * * group of persons who advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence * * *."

One of the witnesses for the Government has testified on direct examination that he became a member of the Communist Party at Milwaukee, Wisconsin, where he engaged in various Communist Party activities and made written reports of such events to agents of the Federal Bureau of Investigation. Three of the reports relate to Communist Party gatherings concerning which the witness has testified in response to questions put by prosecution counsel. Defendants now move for an order

directing the Government to produce these three reports for inspection and use by the defense upon cross-examination of the witness.

The United States Attorney opposes the motion to produce upon the ground that such documents "are to be regarded as confidential" by virtue of regulations designated as "Department of Justice Order No. 3229,"*

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*"Order 3229

"Disclosure or Use of Confidential Records and Information

"May 2, 1939.

"Pursuant to authority vested in me by R.S. 161 (U.S.Code, Title 5, section 22), *It is hereby ordered:*

"All official files, documents, records and information in the office of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

"Frank Murphy,
"The Attorney General."

28 C.F.R. (1946 Supp.) § 51.71, 11 Fed. Reg. 4920 (1946); see 44 U.S.C. § 307.

"Order No. 3229
"Supplement No. 2

"June 6, 1947.

"To All United States Attorneys
Procedure To Be Followed Upon
Receiving A
Subpoena Duces Tecum

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for in-

issued by the Attorney General under authorization of 5 U.S.C.A. § 22 which provides in part that: "The head

structions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

"It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

"It is not necessary to produce the original document; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

"Tom C. Clark,
"Attorney General."

Pike & Fischer, Administrative Law (2d Series), Dept. of Justice 1.

of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department * * * and the custody, use, and preservation of the records, papers, and property appertaining to it."

[1, 2] The regulations relied upon are a part of "that body of public records of which the courts take judicial notice." Caha v. United States, 1894, 152 U.S. 211, 222, 14 S.Ct. 513, 517, 38 L.Ed. 415; 44 U.S.C.A. § 307. And having been held to constitute a valid exercise by the Attorney General of his authority under 5 U.S.C.A. § 22, Touhy v. Ragen, 1951, 340 U.S. 462, 463-464, note 1, 468-469, 71 S.Ct. 416, 95 L.Ed. 417, the regulations "have the force of law." Ex parte Reed, 1879, 100 U.S. 13, 22, 25 L.Ed. 538; Boske v. Comingore, 1900, 177 U.S. 459, 469, 20 S.Ct. 701, 44 L.Ed. 846; Ex parte Sackett, 9 Cir., 1935, 74 F.2d 922.

Exercising the discretion reserved to him in the regulations, the Attorney General, speaking through the United States Attorney at bar, takes the position that the Government cannot be required to produce for use by the defense "confidential" documents such as the three reports in question here.

The court has ordered the reports delivered under seal to the Clerk for inspection by the judge *in camera* to determine whether the documents have sufficient evidentiary value in any event to warrant disclosure to the defense. The Attorney General has complied with the order, and the reports have been marked as exhibits numbered for identification 729, 730 and 731, to be kept sealed pending further order of court. Cf. United States v. De Normand, 2 Cir., 1945, 149 F.2d 622, 625, certiorari

denied, 1945, 326 U.S. 756, 66 S.Ct. 89, 90 L.Ed. 454, id. 1947, 330 U.S. 822, 67 S.Ct. 769, 91 L.Ed. 1272; United States v. Cohen, 2 Cir., 1945, 148 F.2d 94, certiorari denied, 1945, 325 U.S. 852, 65 S.Ct. 1087, 89 L.Ed. 1972; United States v. Ebeling, 2 Cir., 1944, 146 F.2d 254, 257; United States v. Schneiderman, S.D.Cal., 1952, 104 F. Supp. 405.

It is urged in support of the pending motion that, notwithstanding the regulations of the Attorney General, defendants are entitled as of right to inspect the "F. B. I. reports" under authority of Bowman Dairy Co. v. United States, 1951, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879. On the other side the Attorney General contends that he is entitled as of right to withhold production and inspection and use of the reports under authority of the regulations.

[3] In my opinion neither contention is sound. The matter is one which *ex necessitate* must rest within the discretion of the trial court. See Crosby v. Pacific S. S. Lines, 9 Cir., 1943, 133 F.2d 470, 475, certiorari denied, 1943, 319 U.S. 752, 63 S.Ct. 1166, 87 L.Ed. 1706; Shores v. United States, 8 Cir., 1949, 174 F.2d 838, 844-845; United States v. Schiller, 2 Cir., 1941, 187 F.2d 572, 575-576; United States v. Schneiderman, supra, 104 F.Supp. at page 408; Wigmore, Evidence, § 2379 (3d ed. 1940).

[4] If a document material to the defense is of such a nature that the confidential information which it contains may be excised or by other means withheld from public disclosure without impairing the evidentiary value of the writing, the trial court will exercise discretionary powers to the end that the competing interests of both Govern-

ment and defense may be satisfied. See United States v. Burr, C.C.Va., 1807, 25 Fed.Cas. 187, 190-192, No. 14694.

[5] Where, however, the nature of the document or the character of its contents is such that the confidential information therein contained cannot fairly be withheld without diminishing the possible evidentiary value of the writing to the defense, then the court must determine in the excercise of discretion whether, notwithstanding the confidential information, the accused should be permitted to compel production of the document for use as evidence on behalf of the defense.

In United States v. Burr, supra, C.C.Va., 1807, 25 Fed. Cas. 187, 192, Id. 25 Fed. Cas. 30, No. 14692d, Mr. Chief Justice Marshall sat as Circuit Justice upon the trials of former Vice-President Aaron Burr charged with treason and high misdemeanor. The defense moved the court for an order directing issuance of a subpoena *duces tecum* to compel production of a letter then in the custody of the President, Thomas Jefferson.

The subpoena was awarded and, upon motion of the defense "that the cause should be continued until the letter should be produced," the venerable Chief Justice observed that "it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. * * * The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced * * *. In regard to the secrecy of these parts which it is stated are improper to give out to the

world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject."

[6, 7] The court's discretionary power to compel production of a document in the custody of a government agency must be exercised in the light of the requirement of the Sixth Amendment that: "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * *." [U.S.Const. Amend. VI.] This constitutional mandate extends to documentary as well as oral evidence, United States v. Burr, supra, 25 Fed.Cas. at page 30, 35; see also Wilson v. United States, 1911, 221 U.S. 361, 372, 31 S.Ct. 538, 55 L.Ed. 771; 8 Wigmore, Evidence, §§ 2191, 2193, 2200 (3d ed. 1940); 3 Wharton, Criminal Evidence, §§ 1105, 1106 (11th ed. 1935).

[8] Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interest of the

accused in having the document for use in making a defense to the charge. See Langnes v. Green, 1931, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520. This involves a balancing of the inconvenience of public disclosure against the inconvenience of making a defense without the document. Cf. Shores v. United States, supra, 8 Cir., 174 F.2d at pages 844-845. The latter factor is to be measured largely by an appraisal of the probative or evidentiary value of the document—what possible use the defense could make of it for impeachment or other evidentiary purposes.

[9] If the possible evidentiary value of a document to the defense is clearly negligible, the trial court might well be prompted to hold that the interest of the accused in the use of the writing as evidence is outweighed by some public policy, such as that which favors protection from disclosure of the identity of an informer to law enforcement officials, cf. Scher v. United States, 1938, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151, or that which favors protection of information affecting national security, cf. Zimmerman v. Poindexter, D.C.Hawaii, 74 F.Supp. 933, and other "secrets of state." See 8 Wigmore, Evidence, §§ 2367-2378a (3d ed. 1940).

[10] If, on the other hand, the possible evidentiary value is such that use of the document may fairly be considered "essential to the defense," the Government should be compelled to produce it. Scher v. United States, supra, 305 U.S. at page 254, 59 S.Ct. 174, 83 L.Ed. 151; United States v. Coplon, 2 Cir., 1950, 185 F.2d 629, 638-639, certiorari denied, 1952, 342 U.S. 920, 72 S.Ct. 362; United States v. Grayson, 2 Cir., 1948, 166 F.2d 863,

870; Sorrentino v. United States, 9 Cir., 1947, 163 F.2d 627; Wilson v. United States, 3 Cir., 1932, 59 F.2d 390, 392.

[11] Whenever the court is called upon to determine in the course of trial whether competent evidence, which appears relevant and material to the proof of some ultimate or evidentiary fact, will be "essential to the defense" in a criminal case, justice requires that doubt be weighed in favor of the defense. How essential the evidence may turn out to be raises a mere question of degree. If competent and relevant, and if material to any degree not clearly *de minimis*, both reason and policy advocate that the defense should be entitled to compel production of the evidence in fulfillment of the assurance of the Sixth Amendment. Cf. United States v. De Normand, supra, 149 F.2d at pages 625-626; United States v. Cohen, supra, 148 F.2d at page 94; United States v. Simonds, 2 Cir., 1945; 148 F.2d 177, 179.

To borrow again the words of Mr. Chief Justice Marshall in United States v. Burr, supra, 25 Fed.Cas. at page 191: "The question will recur, is it really material to his defence? The only evidence that can be received on this point is from the party himself, and he has made his affidavit to its materiality. But that is said to be insufficient; and why? Because the averment is, that the letter 'may be material' in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor. • • • It is objected that the particular passages of the letter

which are required are not pointed out. But how can this be done while the letter itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence? * * * Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge."

In the case at bar defendants urge that the reports should be held "essential to the defense" because the witness allegedly made use of the documents to refresh recollection prior to his appearance on the witness stand. The court finds however that the witness did not see the reports after sending them to the Federal Bureau of Investigation long prior to the trial, and did not make use of them for the purpose of refreshing recollection either in or out of court. See Goldman v. United States, 1942, 316 U.S. 129, 133, 62 S.Ct. 993, 86 L.Ed. 1322; United States v. Rappy, 2 Cir., 1946, 157 F.2d 964, 967-968, certiorari denied, 1947, 329 U.S. 806, 67 S.Ct. 501, 91 L.Ed. 688; Little v. United States, 8 Cir., 1937, 93 F.2d 401, 406, certiorari denied, 1938, 303 U.S. 644, 58 S.Ct. 643, 82 L.Ed. 1105; Mullaney v. United States, 9 Cir., 1936, 82 F.2d 638, 643; Lennon v. United States, 8 Cir., 1927, 20 F.2d 490, 494.

In considering the motion at bar I have examined *in camera* the three reports in question and find that although their possible evidentiary value to the defense appears to be slight indeed, it cannot be said that the documents are not to some degree "essential to the defense."

The Government nonetheless presses the contention that disclosure of one of the reports in particular [Exhibit 731] would reveal the identity of one or more confidential informants and so contravene the public policy which encourages private citizens to furnish public officials with information relating to violations of law. 8 Wigmore, Evidence, § 2374 (3d ed. 1940).

This sound public policy favors treatment of such information, and more particularly the identity of an informant, as confidential and privileged. Vogel v. Gruaz, 1884, 110 U.S. 311, 315-316, 4 S.Ct. 12, 28 L.Ed. 158; United States v. Li Fat Tong, 2 Cir., 1946, 152 F.2d 650, 652. As declared by the Supreme Court: "It is the duty and the right • • • of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. • • • It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government." In re Quarles and Butler, 1895, 158 U.S. 532, 535-536, 15 S.Ct. 959, 960, 39 L.Ed. 1080.

The only confidential informants whose identity might be revealed through public disclosure of the reports sought by the defense at bar are those asserted by the witness to have attended Communist Party gatherings. Yet on direct examination the witness himself was asked by the Government to name the persons present. Presumably if the witness' memory served him, any confidential informants present have already been named. If not, the Government's interrogation of the witness as to the event must be held a waiver of the right to invoke the public policy favoring protection from disclosure of the identity of any informant who may have been among persons present. Cf. Sorrentino v. United States, supra, 163 F.2d at page 627; Wilson v. United States, supra, 59 F.2d at page 390; United States v. Schneiderman, supra, 104 F.Supp. at page 405.

As the court put it in Wilson v. United States, supra, 59 F.2d at pages 391-392: "When the witness has been called by the United States, the trial court may modify the general doctrine by imposing the terms that consent to the disclosure be given or the witness be withdrawn and his testimony struck out as incomplete. • • • A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."

The problem remaining is whether, by virtue of the authority of "Department of Justice Order No. 3229" alone, the Attorney General is entitled to have withheld from public disclosure government papers under his

charge which appear to have some possible evidentiary value to the defense.

To quote Mr. Chief Justice Marshall further: "If it be apparent that the papers are irrelative to the case, or that for state reasons, they cannot be introduced into the defence, the subpoena *duces tecum* would be useless. * * * if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? * * * That there may be matter, the production of which the court would not require, is certain; but * * * that the accused ought, in some form, to have the benefit if it, if it were really essential to his defence, is a position which the court would very reluctantly deny." United States v. Burr, supra, 25 Fed.Cas. at pages 35, 37.

It is unnecessary however to reach the constitutional issue as to the extent of the authority of the Attorney General under the regulations, see Touhy v. Ragen, supra, 340 U.S. at page 469, 71 S.Ct. 416, 95 L.Ed. 417, since the question arises at the outset whether the Attorney General may not have waived any privilege of withholding the reports.

As Judge Learned Hand observed in United States v. Andolschek, 2 Cir., 1944; 142 F.2d 503, 506: "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings

to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively." See also United States v. Krulewitch, 2 Cir., 1944, 145 F.2d 76, 78-79, 156 A.L.R. 337; United States v. Beekman, 2 Cir., 1946, 155 F.2d 580, 584.

To paraphrase from the opinion in United States v. Coplon, supra, 185 F.2d at page 638: When the Government chooses to prosecute an individual for crime, it is not free to deny him the right to meet the charge against him by introducing relevant documents which the Government might otherwise claim to be privileged from public disclosure. And whenever the Government's claim of privilege conflicts with the right of the accused "to have compulsory process for obtaining witnesses [and other evidence] in his favor," U.S.Const.Amend. VI, the Attorney General must decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of "secrets of State" and other confidential information in the

Government's possession, which might be relevant to the defense. Cf. United States v. Burr, supra, 25 Fed.Cas. at pages 192-193.

The Government has made no suggestion that public policy against disclosure is sufficiently strong to warrant discontinuance of the prosecution or possible withdrawal of the witness and the striking of his testimony thus far given. Indeed, the Government in effect concedes that no "secrets of State" or other confidential information of importance is here involved.

[12] Accordingly, since the prosecution at bar, conducted under the supervision of the Attorney General [28 U.S.C. § 507(b)], has adduced evidence "touching the subject matter communicated" in the reports, it must be held that any privilege of withholding from inspection and use by the defense of sealed exhibits 729, 730 and 731 under authority of "Department of Justice Order No. 3229" has been waived. See Touhy v. Ragen, supra, 340 U.S. at pages 468, 469, 472-473, 71 S.Ct. 416, 95 L.Ed. 417.

[13] In all events, the Attorney General—no less than the United States Attorney—labors in every criminal prosecution under the solemn duty *ex mero motu* to see that "justice shall be done." Cf. Berger v. United States, 1935, 295 U.S. 78, 88-89, 55 S.Ct. 629, 633, 79 L.Ed. 1314. To that end he cannot properly withhold from the court evidence essential to proper disposition of the case, including *a fortiori* any evidence which may be material to the defense of the accused. See Canon 22, Canons of Professional Ethics, 62 A.B.A.Rep. 1112-1113 (1937).

Accordingly, defendants' motion to compel production of the reports for inspection and use of the defense upon cross-examination of the witness is granted, and the Clerk is ordered to unseal the documents heretofore marked for identification as exhibits 729, 730 and 731.

U. S. v. Schneiderman, et al., No. 21940.

Filed August 19, 1952, cited as 106 Fed. Supp. 892.

MATHES, District Judge.

Defendants are on trial under an indictment charging them as members of an alleged conspiracy to commit offenses against the United States, 18 U.S.C. § 371, prohibited by the Smith Act, 54 Stat. 670 (1940), 18 U.S.C. (1946 ed.) § 10; Id. (1948 ed.) § 2385, "by (1) wilfully * * * advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence * * * and by (2) wilfully * * * helping to organize as the Communist Party of the United States of America * * * a group * * * of persons who teach and advocate the overthrow * * * of the Government of the United States by force and violence, with the intent of causing the * * * overthrow * * * of the Government * * * by force and violence as speedily as circumstances would permit."

The prosecution has rested the case in chief, and the defendants have presented numerous motions to strike portions of the evidence. Although the specifications embraced within the motions are myriad, the grounds upon which the motions are rested may be categorized under relatively few headings.

It is urged that certain evidence should be stricken because any offense which might have been committed during the period to which it relates is barred by the statute of limitations. The indictment was brought on December 21, 1951, and the contention is advanced that no evidence should be admissible as to matters occurring before December 21, 1948, 18 U.S.C. § 3282, even though such matters may have occurred during the period covered by the indictment—i. e., since the effective date of the Smith Act on June 28, 1940, 54 Stat. 670 (1940). The prosecution replies *in summa* that the alleged conspiracy at bar is a continuing one, and hence should be treated as one conspiracy instead of several.

Reliance is thus placed on the statement of Mr. Justice Holmes in United States v. Kissel, 1910, 218 U.S. 601, 607, 31 S.Ct. 124, 126, 54 L.Ed. 1168, that "when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one." See also Brown v. Elliott, 1912, 225 U.S. 392, 400-401, 32 S.Ct. 812, 56 L.Ed. 1136.

[1] It is possible to misinterpret the language quoted as holding that whenever there is a "continuing conspiracy," there is in effect a tolling of the statute of limitations. Of course this is not true. Where as here there are two component elements of the offense—the agreement and an "act to effect the object of the con-

spiracy * * *" 18 U.S.C. § 371—both are essential to constitute a punishable crime. The agreement is the element which can be continuous, while the overt act, by its nature is of short duration. See Hyde v. United States, 1912, 225 U.S. 347, 387-391, 32 S.Ct. 793, 56 L.Ed. 1114 (dissenting opinion, Holmes, J.).

[2] Moreover, even though there may be a continuous agreement, as soon as an act is done "to effect the object" of that agreement, the crime of conspiracy is complete and an indictment for that offense must be found "within three years next after such offense shall have been committed." 18 U.S.C. § 3282; Pinkerton v. United States, 5 Cir., 1944, 145 F.2d 252, 254; Ware v. United States, 8 Cir., 1907, 154 F. 577, 12 L.R.A.,N.S., 1053, certiorari denied, 1907, 207 U.S. 588, 28 S.Ct. 255, 52 L.Ed. 353; see United States v. Bradford, E.D.La.1905, 148 F. 413, 418, 419, affirmed, 5 Cir., 1907, 152 F. 616, certiorari denied, 1907, 206 U.S. 563, 27 S.Ct. 795, 51 L.Ed. 1190.

[3] This does not mean that evidence of the conspiracy antedating the three-year period is not admissible, but rather that in order to convict the accused, the proof must establish that the agreement, shown to exist prior to the three-year period, continued in effect, and an overt act was committed, within the three-year period of the statute of limitations.

[4] Thus the doctrine of "continuing conspiracy" renders admissible evidence of the agreement and of overt acts beyond the three-year period—not to show the guilt of the accused at the time such acts were committed —but to show an illegal agreement, and any participation of a defendant in it, and his knowledge and intent; all to

aid determination by the jury of the issues raised by the indictment as to whether, within the three-year period, (1) the conspiracy existed, (2) the defendant was a party thereto with the knowledge and intent charged, and (3) an overt act was done "to effect the object of the conspiracy".

The problem at bar in this connection is made to appear somewhat complex by the circumstance that the date from which the three-year period should be measured is a matter of dispute. Originally, the defendants were charged under two separate indictments: one charging twelve defendants was filed on July 31, 1951; the other charging the remaining three—defendants Spector, Carlson and Dobbs—was not found until September 5, 1951. Both indictments were later dismissed because of a defect of law, United States v. Schneiderman, S.D. Cal. 1951, 102 F.Supp. 87, and the present indictment charging all fifteen defendants (the case as to defendant Doyle was later severed) was returned on December 21, 1951.

18 U.S.C. § 3288 declares that: "Whenever an indictment • • • is found • • • insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court • • • which new indictment shall not be barred by any statute of limitations."

And 18 U.S.C. § 3289 provides that: "Whenever an indictment is • • • found • • • insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which

such indictment was returned, a new indictment may be returned not later than the end of the next succeeding regular term of such court • • • which new indictment shall not be barred by any statute of limitations."

By virtue of 18 U.S.C. §§ 3288, 3289 the Government argues that evidence of any overt act occurring within three years of the original indictment should be received as proof of the overt act required by 18 U.S.C. § 371. The prosecution does not specify which original indictment should fix the starting date, but the earlier indictment of July 31, 1951, is the only one which could affect the result here, since overt acts 11 and 12 of the present indictment are alleged to have occurred on August 21, 1948, and so are the only ones which fall within the three-year period next preceding the indictment of July 31, 1951, and without the period applicable to the "new indictment."

[5] In any event the August 21, 1948 acts could not be shown as overt acts in the case against defendants Carlson, Dobbs and Spector, inasmuch as the original indictment charging them was not found until September 5, 1951. 18 U.S.C. § 3282.

[6] As to the remaining defendants, the conspiracy is alleged to have commenced "from on or about June 28, 1940" (the effective date of the Smith Act), and to have continued to and including the date of the finding of the present indictment (December 21, 1951). From the very terms of the quoted statute, the original indictments were not found insufficient "after the period • • • of limitations has expired", 18 U.S.C. § 3288, nor will such period "expire before the end of the next regular

term of the court to which such indictment was returned". 18 U.S.C. § 3289. Hence neither statutory provision relating back the date of filing of the "new indictment" is applicable here. See Fed.Rules Crim.Proc. rule 45(c), 18 U.S.C.A.

[7] This holding does not however render inadmissible evidence as to alleged overt acts antedating the three-year period immediately preceding the "new indictment." For such evidence is admissible as relevant to the issue *inter alia* of whether or not an illegal conspiracy existed within the applicable three-year period—in this case December 21, 1948 to December 21, 1951.

The motion to strike, as being beyond the statute of limitations, evidence relating to the period commencing with the effective date of the Smith Act on June 28, 1940 and ending with the commencement of the period of limitations herein on December 21, 1948 must be denied for the reasons stated.

[8] With respect to such evidence, the jury will be instructed in substance as follows:

Evidence as to alleged statements or declarations and teachings of instructors in alleged Communist Party schools, and as to certain alleged statements or declarations and acts of other alleged members of the Communist Party, said to have occurred after the Smith Act became law on June 28, 1940 has been received as being relevant to the issue of what was the nature and character and aims and objectives of the Communist Party during the three-year period immediately preceding the filing of the indictment on December 21, 1951. That is to say, such evidence as to alleged activities of the Communist Party

since June 28, 1940 may be considered in determining whether or not, during the three-year period prior to the finding of the indictment, the Communist Party of the United States of America was a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, as alleged in the indictment.

[9] The jury will be further instructed that if they find existence of the conspiracy charged in the indictment, and further find that all or any of the alleged club chairmen, teachers and others were knowingly and wilfully parties to or members of the conspiracy, then the acts thereafter done and the statements or declarations thereafter made by those whom the jury find to be members of the conspiracy may be considered in connection with the case of any defendant whom the jury also find to be a member of the conspiracy; and may be treated as if the acts or statements or declarations were done or made by such defendant, provided such acts were done and such statements or declarations were made during the continuance of the conspiracy and in furtherance of an object or purpose of the conspiracy.

[10] It is next urged that evidence of matters occurring prior to June 28, 1940—the effective date of the Smith Act, 54 Stat. 670 (1940)—should be stricken. The gist of the argument in support of this motion is that since *ex lege* there could not have existed prior to the Smith Act an illegal conspiracy for the purposes charged, there could be no admissible evidence of acts done or declarations made by alleged co-conspirators prior to the date of the Act.

Evidence as to pre-Smith Act declarations and acts of third persons might possibly be found to constitute conduct of persons in fact engaged at that time in a common enterprise with the defendants. Hitchman Coal & Coke Co. v. Mitchell, 1917, 245 U.S. 229, 249, 38 S.Ct. 65, 62 L.Ed. 260. In such case the agreement made prior to the Smith Act would, if continued, become *ipso facto* an illegal agreement thereafter; and such illegal post-Smith Act agreement and legal pre-Smith Act agreement would amount to the same conspiracy in fact. See Egan v. United States, 8 Cir., 1943, 137 F.2d 369, 381-382 certiorari denied, 1948, 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; cf. United States v. Reading Co., 1920, 253 U.S. 26, 43-45, 40 S.Ct. 425, 64 L.Ed. 760; Standard Oil Co. of New Jersey v. United States, 1911, 221 U.S. 1, 46-47, 31 S.Ct. 502, 55 L.Ed. 619; United States v. E. I. Du Pont De Nemours & Co., C.C.Del. 1911, 188 F. 127, 151-152.

In support of the argument for a ruling in accordance with such a concept of a pre and a post-Smith Act conspiracy identical in fact, the prosecution cites as precedent the handling of analogous testimony in United States v. Dennis, 2 Cir., 1950, 183 F.2d 201, 230, affirmed, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. There the defendants were charged with a violation of § 3 of the Smith Act, 54 Stat. 671 (1940)—conspiring to advocate the overthrow of the Government by force and violence. Whereas the defendants at bar are charged with a violation of 18 U.S.C. § 371—conspiring to commit offenses against the United States by violating 18 U.S.C. § 2385, which proscribes advocacy of the overthrow of the Government by force and violence.

It is urged in support of the Government's position that the difference between the charge in the Dennis case and that at bar is one of form only, necessitated by the repeal of § 3 of the Smith Act incident to revision of Title 18 of the United States Code as of September 1, 1948, 62 Stat. 867 (1948), Act June 25, 1948, § 21, 18 U.S.C.A. following section 5037; United States v. Schneiderman, S.D.Cal.1951, 102 F.Supp. 87, 90. The fact remains it would be legally impossible for the conspiracy charged in the indictment here to have existed as an illegal enterprise at any time prior to the effective date of the Smith Act on June 28, 1940.

Even though acts and declarations prior to June 28, 1940 are held not properly admissible as those of co-conspirators, such evidence is admissible in the case at bar upon another ground. One of the two means or methods which the defendants are charged with conspiring to employ in violating the Smith Act is "by * * * helping to organize as the Communist Party * * * a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government * * * by force and violence * * *." And since pre-Smith Act acts and declarations tend to disclose the nature and character and aims and objectives of the Communist Party during the pre-Smith Act period, such evidence is logically relevant to the issue raised by the indictment as to the nature and character and aims and objectives of the Communist Party during the post-Smith Act period covered by the indictment.

Testimony of witnesses as to acts and statements or declarations of certain of the defendants prior to June

28, 1940 is logically relevant to the issue as to whether or not the particular defendant named was a member of the Communist Party and had knowledge of the nature and character and aims and objectives of the Communist Party during the period covered by the indictment.

The defendants urge, however, that all pre-Smith Act evidence is irrelevant to any issue raised by the indictment at bar, because there is no basis in reason, they say, to draw any inference that activities which were admittedly legal prior to June 28, 1940 were continued after being declared illegal. See United States v. Oregon Medical Society, 1952, 343 U.S. 326, 332-333, 72 S.Ct. 690; Local 167 v. United States, 1934, 291 U.S. 293, 298, 54 S.Ct. 396, 78 L.Ed. 804; Cal.Code Civ.P. § 1963, subd. 32; 2 Wigmore, Evidence § 437 (3d ed. 1940); 1 Wharton, Criminal Evidence § 142 (11th ed. 1935).

[11] But as Wigmore has so clearly explained: "When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end." [2 Wigmore, Evidence § 437 (3d ed. 1940).]

As a rule, then, there is rational basis for assuming that the prior existence of certain facts which show the nature and character and aims and objectives of the Communist Party, and the knowledge thereof by certain defendants, prior to June 28, 1940 is "some indication of probable * * * continuance * * *." Even so, the question

remains as to the probability that the "intervening circumstance" of the passage of the Smith Act would "bring the existence to an end."

If some type of normal unconcealed business activity were involved, it would seem highly probable that an "intervening cause" making such activity illegal would strongly tend to bring such activity to an end. But where as here the activity sought to be proved—conspiracy to teach and advocate the necessity and duty of overthrowing the Government by force and violence as speedily as circumstances permit—is by its very nature covert and without regard for any law of the United States which might proscribe it, the degree of probability that passage of the Smith Act would "bring the existence to an end" seems low in the extreme.

[12] Accordingly, the defendants' motion to strike evidence of matters occurring prior to June 28, 1940 will be denied. However such evidence will be limited to the purposes stated, and the jury will be instructed in substance as follows:

Evidence has been received of alleged statements or declarations and teachings of instructors in alleged Communist Party schools, and of certain alleged statements or declarations and acts of other alleged members of the Communist Party, said to have occurred before the Smith Act became law on June 28, 1940.

Such evidence has been admitted as being relevant to the issue of what was the nature and character and aims and objectives of the Communist Party during the period covered by the indictment. That is to say, such evidence as to alleged activities of the Communist Party before

June 28, 1940 has been admitted to aid the jury in determining whether or not during the period covered by the indictment—that is during the years since June 28, 1940 and more particularly during the three-year period immediately preceding the filing of the indictment on December 21, 1951—the Communist Party of the United States of America was a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, as alleged in the indictment.

Otherwise than as such evidence may aid the jury in determining the nature and character and aims and objectives of the Communist Party during the time covered by the indictment as above stated, evidence of alleged activities prior to June 28, 1940 is not to be considered by the jury as tending to establish the truth of any of the allegations of the indictment, except in this one particular: evidence as to alleged activities of any defendant in the Communist Party before June 28, 1940 may be considered by the jury, as to that defendant only, in determining whether or not such defendant was a member of the Communist Party and had knowledge of the nature and character and aims and objectives of the Communist Party and of what may have been advocated and taught by the Communist Party during the period covered by the indictment. See People v. Steelik, 1921, 187 Cal. 361, 203 P. 78, 84; People v. Wagner, 3d Dist.1924, 65 Cal.App. 704, 225 P. 464, 468-469; People v. La Rue, 3d Dist.1923, 62 Cal.App. 276, 216 P. 627, 630; People v. Roe, 3d Dist. 1922, 59 Cal.App. 690, 209 P. 381, 384; cf.

Potlatch Lumber Co. v. Anderson, 9 Cir., 1912, 199 F. 742, 748.

[13] Next to be considered is the admissibility of evidence of the acts and conduct and declarations or statements, during the period covered by the indictment, of third persons alleged to be co-conspirators with the defendants. It is settled that, before such evidence may be considered, the evidence must first show the existence of the conspiracy. Glasser v. United States, 1942, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680; Bartlett v. United States, 10 Cir., 1948, 166 F.2d 920, 924; Mayola v. United States, 9 Cir., 1934, 71 F.2d 65, 67; Nibbelink v. United States, 6 Cir., 1933, 66 F.2d 178, 179.

[14-17] As was pointed out in Allen v. United States, 7 Cir., 1924, 4 F.2d 688, 691 certiorari denied, 1925, 267 U.S. 597, 598, 45 S.Ct. 352, 69 L.Ed. 806, 1925, 268 U.S. 689, 45 S.Ct. 509, 69 L.Ed. 1158: "A conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to

violate the law, a party knowingly co-operates to further the object of the conspiracy, he becomes a party thereto."

[18, 19] A conspiracy, like any other crime, can only be established by the various external manifestations of the parties—the acts and conduct and declarations or statements of third persons, taken together with the acts and conduct and declarations or statements of the defendants. Garhart v. United States, 10 Cir., 1946, 157 F.2d 777, 780-781. This does not mean that the existence of the conspiracy may be proved solely by the declarations or statements of the defendants themselves, for these might fall into the field of extra-judicial admissions and so require corroboration. Since conspiracy is the criminal offense charged, there must be some corroborating evidence of the existence of this corpus delicti *aliunde* the extra-judicial statements or declarations of the accused, United States v. Di Orio, 3 Cir., 1945, 150 F.2d 938, 940, certiorari denied, 1945, 326 U.S. 771, 66 S.Ct. 175, 90 L.Ed. 465; Anderson v. United States, 6 Cir., 1941, 124 F.2d 58, 65-66 reversed on other ground, 1943, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829; Cummings v. United States, 9 Cir. 1926, 15 F.2d 168, 169; cf Wiggins v. United States, 9 Cir. 1933, 64 F.2d 950, 951-952, certiorari denied, 1933, 290 U.S. 657, 54 S.Ct. 72, 78 L.Ed. 569; 3 Wigmore, Evidence § 821 (3d ed. 1940, 7 Id. §§ 2070-2071; 2 Wharton, Criminal Evidence §§ 640-641 (11th ed. 1935), except in cases where the incriminatory statements or declarations of the accused were made "prior to the crime," or themselves constitute the offense or an essential element thereof. See Warszower v. United States, 1941, 312 U.S. 342, 347-348, 61 S.Ct. 603, 85 L.Ed. 876;

cf. Yost v. United States, 4 Cir., 1946, 157 F.2d 147; Tabor v. United States, 4 Cir., 1945, 152 F.2d 254.

But there is no necessity to consider here whether an alleged statement or declaration of a defendant should be classed as a declaration before the occurrence of the crime, or as a statement constituting the crime, for there is abundant evidence *aliunde* declarations of the accused which, if believed, would be sufficient to show the existence of the conspiracy. See Glasser v. United States, supra, 315 U.S. at 80-81, 62 S.Ct. 457, 86 L.Ed. 680; Carlson v. United States, 10 Cir., 1951, 187 F.2d 366, 370-371, certiorari denied, 1951, 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367; United States v. Manton, 2 Cir., 1938, 107 F.2d 834, 839, certiorari denied, 1940, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012.

[20] If and when existence of the conspiracy is established, evidence as to membership in the conspiracy is the next problem to be faced. It is conceded that a defendant's membership must be shown without regard to and independent of the acts and statements or declarations of others, Glasser v. United States, supra, 315 U.S. at 74, 62 S.Ct. 457, 86 L.Ed. 680; May v. United States, D.C.Cir., 1949, 84 U.S.App. D.C. 233, 175 F.2d 994, 1007-1008, certiorari denied, 1949, 338 U.S. 830, 70 S.Ct. 58, 94 L.Ed. 505; Bartlett v. United States, supra, 166 F.2d at page 924; Mayola v. United States, supra, 71 F.2d at page 67; Minner v. United States, 10 Cir., 1932, 57 F.2d 506, 511; see also cases collected in United States v. United States Gypsum Co., D.D.C. 1946, 67 F.Supp. 397, 451-452.

But the defendants urge that the source of proof of the conspiracy membership of third-party declarants is subject not only to the limitation just stated, but also to the added limitation that third-party membership in the conspiracy must be shown without regard to and independent of the acts and statements or declarations of the third persons themselves. As claimed authority for this contention the defendants cite Glasser v. United States, supra, 315 U.S. at page 74, 62 S.Ct. 457. But the Glasser case is in no sense authority for the claimed limitation last stated. See May v. United States, supra, 84 U.S.App.D.C. 233, 175 F.2d at page 1008, n. 40.

What the defendants are thus arguing is that proof of participation of a third-party declarant in a conspiracy is analogous to proof of agency; that just as the hearsay declarations of a claimed agent may not be used to prove existence of the agency, Holland v. Cooper, 5 Cir., 1951, 192 F.2d 214, 216; Brownell v. Tide Water Associated Oil Co., 1 Cir., 1944, 12 1F.2d 239, 244; Nygard v. Dickinson, 9 Cir., 1938, 97 F.2d 53, 57, neither may the acts or declarations of third-party declarants be used to prove either existence of the conspiracy or the conspiracy membership of the third-party declarant.

True, the acts and declarations of one person may not serve as evidence of another's relationship as co-conspirator to an alleged conspiracy for reasons closely akin to those which give force to the rule that the extra-judicial declaration of a claimed agent may not be used to establish another's relationship as principal to an alleged agency. But there the analogy ceases, since admitting

evidence of acts and declarations of a third person to prove his own membership in a conspiracy permits such evidence to serve merely as proof of the relationship of the third-party actor or declarant himself—and not the relationship of any other person—to the conspiracy. Such acts and declarations thus lack the self-serving character of those which would establish the declarant's relationship to another person, and indeed possess the trustworthy character of statements against interest. See Donnelly v. United States, 1913, 228 U.S. 243, 272, 277-278, 33 S.Ct. 449, 57 L.Ed. 820, 5 Wigmore, Evidence §§ 1476-1477 (3d ed. 1940).

Moreover, the effect of what the defendants urge in this connection discloses plainly the fallacy of their position. If the conspiracy membership of third-party declarants may not be shown by the acts and statements or declarations of others and, under the rule for which the defendants contend, may not be shown through proof of their conduct, then acts and statements or declarations of co-conspirators simply could not be admitted in any conspiracy trial—a result in which the defendants themselves would not concur.

[21] In every prosecution for conspiracy, problems involving the admissibility of acts and statements or declarations of conspirators raise questions as to the competency of evidence. Whether the condition precedent that there be some evidence of the existence of the conspiracy *dehors* the statements or declarations of the accused, Cummings v. United States, supra, 15 F.2d at page 169; cf. Wiggins v. United States, supra, 64 F.2d at page 951-952, and whether "there is proof *aliunde*" acts and

statements or declarations of the third-party declarant that the the accused was "connected with the conspiracy", Glasser v. United States, supra, 315 U.S. at page 74, 62 S.Ct. 457, 467, are preliminarily issues of fact to be decided by the judge in determining whether acts and statements or declarations of an alleged co-conspirator are to be received as evidence against the accused.

[22] As Judge Learned Hand said in United States v. Dennis, supra, 183 F.2d at page 231: "* * * the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends * * *." Cf. D'Aquino v. United States, 9 Cir., 1951, 192 F.2d 338, 357; United States v. Kertess, 2 Cir., 1944, 139 F.2d 923, 929, certiorari denied, 1944, 321 U.S. 795, 64 S.Ct. 847, 88 L.Ed. 1084; Wynkoop v. United States, 9 Cir., 1927, 22 F.2d 799; Pearlman v. United States, 9 Cir., 1926, 10 F.2d 460, 462; Daeche v. United States, 2 Cir., 1918, 250 F. 566, 571.

Here, as in Clune v. United States, 1895, 159 U.S. 590, 592-593, 16 S.Ct. 125, 126, 40 L.Ed. 269, the prosecution is "seeking to establish a conspiracy by circumstantial testimony". And as Mr. Justice Brewer there said: "It is familiar law that where a case rests upon that character of evidence, much discretion is left to the trial court, and its ruling will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact." See also Delaney v. United States, 1924, 263 U.S. 586, 590, 44 S.Ct. 206, 68 L.Ed. 462; Wiborg v. United States, 1896, 163 U.S. 632, 657-658, 16 S.Ct. 1127, 41 L.Ed. 289; United States v. Von Clemm, 2 Cir., 1943,

136 F.2d 968, 971, certiorari denied, 1943, 320 U.S. 769, 64 S.Ct. 81, 88 L.Ed. 459.

[23-25] I find that there is at bar some evidence of the existence of the alleged conspiracy *dehors* the statements or declarations of the accused. I find also that there is proof *aliunde* acts and statements or declarations of third parties that the accused were members of the alleged conspiracy as charged.

The defendants' motion to strike evidence of acts and declarations of alleged co-conspirators, as such, must therefore be denied, and the jury will be instructed substantially as follows:

In your consideration of the evidence you should first determine whether or not the conspiracy existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine, as to each defendant, whether or not he or she was knowingly and willfully a party to or member of the conspiracy.

In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to the conspiracy membership of a particular defendant from any evidence as to his or her own statements or declarations and acts or conduct.

If you find that the alleged conspiracy did exist and that all or any of the defendants were members of such conspiracy as charged, you should then determine whether the alleged club chairmen, teachers and others mentioned in the testimony, but not named as defendants in the

indictment, were knowingly and willfully members of the conspiracy during the period of time covered in the indictment. In this determination, as in the determination of the conspiracy membership of any defendant, only the statements or declarations and acts or conduct of the person whose membership is in question, and not the statements or acts of others may be considered.

If and when the existence of the conspiracy charged in the indictment and the membership of all or any of the defendants in such conspiracy has been found, then the acts thereafter done and the statements or declarations thereafter made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy, even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

So if you conclude from the evidence that a defendant was a member of the conspiracy, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, including other defendants who you may find were members of the conspiracy, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment. But otherwise any admission or incriminatory statement made outside of court

by one defendant may not be considered as evidence against another defendant not present when the statement was made.

The defendants also seek to strike as allegedly improper the conclusions of several witnesses. Principal among these are conclusions to the effect that certain third persons were members of the Communist Party. So this motion presents the question whether the court should allow the witness briefly to state the result of his reasoning, or require him to detail the facts behind the conclusion, and allow the jury to find the result.

[26] The general rule is that if the facts underlying a conclusion may be easily stated and as stated will accurately reproduce to the jury what the witness has observed, then the conclusions should not be allowed. If, however, such a practice has the effect of only verbally tongue-tying the witness or of making it impossible for the witness to convey to the jury what he has observed, then statement of a conclusion should be allowed. United States v. Petrone, 2 Cir., 1950, 185 F.2d 334, 336, certiorari denied, 1951, 340 U.S. 931, 71 S.Ct. 493, 95 L.Ed. 672; United States v. Cotter, 2 Cir., 1932, 60 F.2d 689, 693-694, certiorari denied, 1932, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575; Nichols v. United States, 5 Cir., 1931, 48 F.2d 46, 49; Central R. Co. of New Jersey v. Monahan, 2 Cir., 1926, 11 F.2d 212, 214; Manney v. Housing Authority of City of Richmond, 79 Cal.App.2d 453, 180 P.2d 69, 73 (1947); 7 Wigmore, Evidence § 1924 (3d. ed. 1940).

[27] In the case at bar, unless the witness happened to be keeper of the membership rolls of the Communist Party, it is difficult to envision a recital of the facts

showing how he knew a certain person was a party member. To determine who was a party member, where as here direct indicia of membership do not appear to have existed, in reality is but a matter of showing association and of stating how the person was known to the witness. Thus the conclusions in question were necessary as a matter of practicality, and the remedy of the defendants was by way of full cross examination, cf. United States v. Petrone, supra, 185 F.2d at page 336; United States v. Stoehr, M.D.Pa. 1951, 100 F.Supp. 143, 156, not by motion to strike.

[28] The defendants also move to strike certain documentary evidence as barred by the doctrine of res judicata. In this connection it is claimed that certain allegedly basic Communist works, such as Foundations of Leninism by J. Stalin, State and Revolution by V. I. Lenin, the History of the Communist Party of the Soviet Union, and the Communist Manifesto by Karl Marx have already been litigated in the case of Schneiderman v. United States, 1943, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796, and may not therefore be re-litigated here. The former Schneiderman case was a civil action brought by the Government under the provisions of § 15 of the Act of June 29, 1906, 34 Stat. 596, 8 U.S.C.A. § 405, to cancel the defendant Schneiderman's certificate of citizenship which had been granted in 1927.

In that action the complaint charged defendant Schneiderman had illegally procured his naturalization certificate in that at the time of his naturalization and during the five years preceding his naturalization he "had not behaved as a person attached to the principles

of the Constitution of the United States and well disposed to the good order and happiness of the United States, but in truth and in fact during all said time, [he] was a member of and affiliated with and believed in and supported the principles of organizations then known as the Workers (Communist) Party of America and the Young Workers (Communist) League of America, whose principles were opposed to the principles of the Constitution of the United States and * * * advocated and taught the overthrow of the Government, Constitution and Laws of the United States by force and violence."

The lower court's determination that Schneiderman's citizenship certificate should be cancelled was reversed by the Supreme Court because "the Government has not proved by 'clear, unequivocal and convincing' evidence that the naturalization court could not have been satisfied that petitioner was attached to the principles of the Constitution when he was naturalized." Schneiderman v. United States, supra, 320 U.S. at page 142, 63 S.Ct. 1333, 1345.

Patently such litigation of the documents in question could not touch the manner in which the writings might be used in the future. That a person may have been acquitted of murder with a certain gun would not bar the prosecution from introducing the identical gun should that person use it in another killing. By the same token since the defendants at bar have allegedly used the documents in question in an illegal manner since 1927, nothing adjudicated as of 1927 could serve to bar the introduction of such documents upon the trial of the later charge.

[29] Accordingly, the motion to strike grounded upon the plea of res judicata will be denied, and the jury will be instructed substantially as follows:

During the course of the trial there have been various references to the case of Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796. That case was not a prosecution under the Smith Act, and the Supreme Court did not there determine any of the issues raised by the indictment here.

Evidence as to that case was received on the issue of intent in this case, and is to be considered insofar as it may aid determination of that issue here.

[30, 31] During the course of the examination of prosecution witnesses, occasionally a witness has answered a question not put, or has volunteered testimony not responsive to the pending question. The defendants now seek to strike such answers as being non-responsive.

Wigmore holds that the objection of non-responsiveness is not, as such, a ground for the exclusion of testimony, declaring that neither questioning nor opposing attorney should be permitted to make this objection since "No party is owner of facts in his private right. No party can impose silence on the witness called by Justice." Wigmore, Evidence § 785 (3d ed. 1940).

While it is true that neither side has the right to suppress the truth, it is an obvious requisite of orderly procedure that each side have a voice in determining the order in which the truth shall be told. If the questioning attorney attempts to suppress the truth, opposing counsel can bring it out on cross or re-direct examination.

But to deny the questioning attorney the privilege of having non-responsive answers stricken would make the course of direct examination infinitely more difficult and render cross examination virtually useless.

These considerations point to the desirability of the rule that counsel who is not conducting the questioning has no standing to ask that a non-responsive answer be stricken upon the sole ground of lack of responsiveness. Parente v. United States, 8 Cir., 1936, 82 F.2d 722, 724; Page Steel & Wire Co. v. Blair Engineering Co., 3 Cir., 1927, 22 F.2d 403, 406, certiorari denied, 1928, 276 U.S. 623, 48 S.Ct. 303, 72 L.Ed. 737; Ridenour v. United States, 3 Cir., 1926, 14 F.2d 888, 891; Holzer v. Read, 1932, 216 Cal. 119, 122, 13 P.2d 697, 698; Hirshfeld v. Dana, 1924, 193 Cal. 142, 148, 223 P. 451, 453-454; but see Cal.Code Civ.Proc. § 2056; Westman v. Clifton's Brookdale, 2 Dist. 1948, 89 Cal.App.2d 307, 200 P.2d 814; cf. Burns v. California Milk Transport, 2 Dist. 1948, 89 Cal. App.2d 70, 200 P.2d 43; People v. Geibel, 2 Dist. 1949, 93 Cal.App.2d 147, 208 P.2d 743. Accordingly, the defendants' motion to strike certain evidence solely upon the ground of lack of responsiveness to a pending question will be denied.

[32] Last to be considered is evidence which is claimed to be too remote and prejudicial in relation to its relevance. Such evidence embraces alleged activity in other organizations than the Communist Party, alleged activity of various defendants and other alleged members of the Communist Party on matters of foreign policy and highly controversial domestic matters, evidence of isolated incidents which do not tend to show the nature and char-

acter or aims and objectives of the Communist Party, and evidence of other matters only remotely relevant to the issues at bar. See 1 Wharton, Criminal Evidence §§ 227, 230 (11th ed. 1935).

In a case such as this, where issues are raised as to the nature and character and aims and objectives of the Communist Party, as well as the intent of the defendants in matters of advocacy, there is very little which may not correctly be said to be in some degree relevant. It is my opinion however that proper exercise of judicial discretion requires striking from the record those matters which might lead the jury down a collateral issue or might tend to subject them to some prejudice, even though the evidence involving such matters might be technically relevant. See United States v. Werner, 2 Cir., 1947, 160 F.2d 438, 443; Metropolitan Life Ins. Co. v. Armstrong, 8 Cir. 1936, 85 F.2d 187, 193; Kettenbach v. United States, 9 Cir., 1913, 202 F. 377, 384, certiorari denied, 1913, 229 U.S. 613, 33 S.Ct. 772, 57 L.Ed. 1352; United States v. Stoehr, supra, 100 F.Supp. at page 155; 1 Wharton Criminal Evidence § 370 (11th ed. 1935).

The considerations just stated prompt the granting of many of the defendants' motions to strike which are specified in the accompanying order. All pending motions to strike which are not expressly granted in the accompanying order are hereby denied.

U. S. v. Schneiderman, et al., No. 21940.

Filed August 18, 1952, cited as 106 Fed. Supp. 906.

MATHES, District Judge.

Fourteen defendants herein have been tried and found guilty by the jury of conspiring to commit offenses against the United States, 18 U.S.C.A. § 371, prohibited by the Smith Act, 54 Stat. 670 (1940); 18 U.S.C.(1946 ed.) § 10; id. (1948 ed.) § 2385, "by (1) wilfully * * * advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence * * * and by (2) wilfully * * * helping to organize as the Communist Party of the United States of America * * * persons who teach and advocate the overthrow * * * of the Government of the United States by force and violence, with the intent of causing the * * * overthrow * * * of the Government * * * by force and violence as speedily as circumstances would permit."

At the close of the Government's case in chief, the defendants moved for a judgment for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and this motion was denied. Upon the close of the evidence, the motion was renewed, ruling was reserved, and the case was submitted to the jury. The defendants now urge that the motion be granted and a judgment of acquittal entered notwithstanding the verdict, Fed.R.Crim.P. 29(b). An alternative motion for a new trial, Fed.R.Crim.P. 33, and a motion in arrest of judgment, Fed.R.Crim.P. 34, are also presented.

Rule 29(a) directs the court to "order the entry of judgment of acquittal * * * if the evidence is insufficient

to sustain a conviction * * *." The rule is silent as to the test to be applied in measuring the sufficiency of the evidence to sustain a verdict of guilty.

[1] In Curley v. United States, D.C. Cir., 1947, 81 U.S.App.D.C., 160 F.2d 229, 232, certiorari denied, 1947, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 the court states: "The true rule * * * is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

[2] There is an apparent conflict between the view thus expressed in Curley v. United States, supra, 160 F.2d at page 232, and that expressed in United States v. Feinberg, 2 Cir., 1944, 140 F.2d 592, 594, certiorari denied, 1944, 322 U.S. 726, 64 S.Ct. 943, 88 L.Ed. 1562, where Judge Learned Hand declared "the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and * * * given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt."

[3] But the "true rule" of the Curley case and the "standard of evidence" set up in the Feinberg case are found upon analysis to be one and the same. See United States v. Cohen, 2 Cir., 1944, 145 F.2d 82, 86, certiorari denied, 1945, 323 U.S. 799, 65 S.Ct. 553, 89 L.Ed. 637;

United States v. Andolschek, 2 Cir., 1944, 142 F.2d 503, 504. Both are obviously intended to clarify the oft-stated requirement that there must be "substantial evidence" of guilt to warrant submission of the case to the jury. Cf. Pierce v. United States, 1920, 252 U.S. 239, 251, 40 S.Ct. 205, 64 L.Ed. 542; Stoppelli v. United States, 9 Cir., 1950, 183 F.2d 391, 393, certiorari denied, 1950, 340 U.S. 864, 71 S.Ct. 88, 95 L.Ed. 631; Crono v. United States, 9 Cir., 1932, 59 F.2d 339, 340.

[4, 5] As Judge Sanborn explained in Isbell v. United States, 8 Cir., 1915, 227 F. 788, 792-793: "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. * * * This is the only question the court is required or permitted to determine * * * and where there [is] any substantial evidence inconsistent with the innocence of the accused, although it may have been contradicted and overwhelmed by the testimony to the contrary, the weight of the evidence, the credibility of the witnesses and the guilt or innocence of the defendant are left to the determination of the jury."

[6] Under our common-law system of justice the ultimate standard in the application of every rule is one of reasonableness. See Funk v. United States, 1933, 290 U.S. 371, 383-385, 54 S.Ct. 212, 78 L.Ed. 369; Pound, The Spirit of the Common Law, 182-183 (1921); Pound, Justice According to Law, 60 (1951).

[7] In keeping with that standard the test in every case must be whether the evidence is such that the jury

might reasonably base a finding of guilt thereon. If so, the evidence in support of the charge is held to be substantial and sufficient to sustain a conviction. Stoppelli v. United States, supra, 183 F.2d at pages 393-394; cf. Tennant v. Peoria etc. Ry. Co., 1944, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520; Sioux City & P. Railroad Co. v. Stout, 1873, 17 Wall. (84 U.S.) 657, 663-665, 21 L.Ed. 745.

[8] To apply the test—to review the evidence and determine whether the jury might reasonably base a finding of guilt thereon—involves three steps: *First*—finding every fact which the jury might reasonably find from the evidence in support of the verdict; *Second*—finding every fact which the jury might reasonably infer from all facts which the jury might reasonably find have been proved—i.e. drawing "justifiable" or reasonable inferences of fact; and *Third*—determining whether all facts which reason permits to be found from the evidence in favor of conviction plus all facts which reason permits to be inferred therefrom are sufficient to enable a jury reasonably to find every essential element of the charge.

[9] If the facts which reason permits to be found from the evidence and the inferences which reasonably may be drawn therefrom can be combined to make out proof of the crime charged, the evidence must be held sufficient to sustain a conviction and the motion for judgment of acquittal accordingly denied.

[10] For if the evidence be such that the verdict of guilt falls within the bounds of reason—within that realm of the debatable where reasonable persons may differ—then the decision of the jurors as judges of the facts must stand, unless it appear that the force of some extra-

neous circumstance or influence prevented the jurors from functioning as the law contemplates a jury should function. See Mattox v. United States, 1892, 146 U.S. 140, 147-150, 13 S.Ct. 50, 36 L.Ed. 917; Rakes v. United States, 4 Cir., 1948, 169 F.2d 739, 745, certiorari denied, 1948, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380; Baker v. Hudspeth, 10 Cir., 1942, 129 F.2d 779, 782, certiorari denied, 1942, 317 U.S. 681, 63 S.Ct. 201, 87 L.Ed. 546; cf. Dennis v. United States, 1950, 339 U.S. 162, 171-172, 70 S.Ct. 519, 94 L.Ed. 734; Frazier v. United States, 1948, 335 U.S. 497, 513, 69 S.Ct. 488, 93 L.Ed. 1072; Clark v. United States, 1933, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993; United States v. Ball, 1896, 163 U.S. 662, 674, 16 S.Ct. 1192, 41 L.Ed. 300.

[11] Applying the stated test in the case at bar, it would seem beyond contention that the jury might reasonably have found from the evidence that the Communist Party is a "group * * * of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence with the intent of causing the * * * overthrow and destruction of the Government * * * by force and violence as speedily as circumstances would permit."

Indeed, there is persuasive argument that such is the common notoriety of this alleged objective of the Communist Party that the courts might properly take judicial notice of it. See Internal Security Control Act of 1950, § 2, 64, Stat. 987 (1950), 50 U.S.C.A. § 781(15); H.R.Rep. No. 2980, 81st Cong., 1st Sess. (1950); Dennis v. United States; 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; Joint Anti-Fascist Refugee Committee v. McGrath, 1951,

341 U.S. 123, 195, 71 S.Ct. 624, 95 L.Ed. 817; American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; Schneiderman v. United States, 1943, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796; Martinez v. Neely, 7 Cir., 1952, 197 F.2d 462, certiorari filed July 21, 1952; Carlson v. Landon, 9 Cir., 1951, 187 F.2d 991, 997, affirmed, 1952, 342 U.S. 524, 72 S.Ct. 525; United States ex rel. Yokinen v. Commissioner, 2 Cir., 1932, 57 F.2d 707, certiorari denied, 1932, 287 U.S. 607, 53 S.Ct. 11, 77 L.Ed. 528; Murdoch v. Clark, 1 Cir., 1931, 53 F.2d 155, 157; Ungar v. Seaman, 8 Cir., 1924, 4 F.2d 80, 81; In re MacKay, N.D.Ind.1947, 71 F.Supp. 397, 398-399; United States ex rel. Fortmueller v. Commissioner, S.D. N.Y.1936, 14 F.Supp. 484, 487; Ex parte Jurgans, D.Minn. 1927, 17 F.2d 507, 511, affirmed sub nom. Jurgans v. Seaman, 8 Cir., 1928, 25 F.2d 35; cf. Northern Trust Co. v. C. I. R., 7 Cir., 1940, 116 F.2d 96, 98; United States v. Polzin, D.Md.1942, 48 F.Supp. 476, 478; see also Carroll v. United States, 1925, 267 U.S. 132, 159-160, 45 S.Ct. 280, 69 L.Ed. 543; Brown v. Piper, 1875, 91 U.S. 37, 43, 23 L.Ed. 200; Morgan, Judicial Notice, 57 Harv.L.Rev. 269 (1944); 9 Wigmore, Evidence §§ 2565-2583 (3d ed. 1940); Holdsworth, A History of English Law, Vol. IX, pp. 135-139 (1944); Strahorn, The Process of Judicial Notice, 14 Va.L.Rev. 544 (1928); Thayer, A. Preliminary Treatise on Evidence at the Common Law, 277-312 (1898). Contra: Stasinkevich v. Nicolls, 1 Cir., 1948, 168 F.2d 474, 479-480.

The evidence establishes without dispute that the defendants were members and officers or functionaries of varying degrees of standing and activity in the Communist Party during the period covered by the indict-

ment. It is true of course, as § 4(f) of the Internal Security Act of 1950, 64 Stat. 987, 992 (1950), 50 U.S.C.A. § 783(f), provides, that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation • • • of any • • • criminal statute." But the conviction here does not rest upon the mere fact that the defendants were members and officers of the Communist Party.

Rather the conviction at bar must be grounded upon the fact that it was reasonable to infer, from the evidence as to the fact and nature of their connections with and conduct in the Communist Party, that each of the defendants actively and understandingly supported the aims and objectives of the Communist Party, including that of teaching and advocating the necessity and duty of overthrowing and destroying the Government of the United States by force and violence, and helped to promote the organizational growth and the functioning of the Communist Party; all with the intent of causing or bringing about the forcible and violent overthrow and destruction of the Government as speedily as circumstances would permit.

[12, 13] From all the evidence in the case as to the nature and character and aims and objectives of the Communist Party, and the activities of those connected with that organization, it must be held that the jury with reason found the existence of the conspiracy charged in the indictment. Glasser v. United States, 1942, 315 U.S. 60, 80-81, 62 S.Ct. 457, 86 L.Ed. 680; Carlson v. United States, 10 Cir., 1951, 187 F.2d 366, 370-371, certiorari denied, 1951, 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367; United

States v. Manton, 2 Cir., 1938, 107 F.2d 834, 839, certiorari denied, 1940, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012. And from all the evidence as to each of the defendants' connection with and conduct in the Communist Party, the jury was entitled with equal reason to infer that each defendant was a member of the conspiracy with the specific intent charged in the indictment.

But the defendants urge the case at bar is a "free speech case," and hence that stricter proof must be required in keeping with the "clear and present danger" rule.

[14] As pointed out in United States v. Schneiderman, S.D.Cal.1951, 102 F.Supp. 87, 95-96, the "clear and present danger" rule is intended to serve as the standard to be applied in testing the constitutionality on its face of a statute which restrains freedom of expression; to stand as the measure whereby to mark the narrow bounds of restraint upon speech and press which will be tolerated as reasonable and hence constitutional in the light of the prohibitions of the First Amendment, U.S. Const. Amend. I.

[15] When invoked as here—not to test the constitutionality of the statute itself, Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137—but to test whether the statute is constitutionally applied to a given case, the "clear and present danger" rule furnishes the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused. See Schenck v. United States, 1919, 249 U.S. 47, 51-52, 39 S.Ct. 247, 63 L.Ed. 470; Frohwerk v. United States, 1919, 249 U.S. 204, 209, 39 S.Ct. 249, 63 L.Ed. 561; Debs

v. United States, 1919, 249 U.S. 211; 39 S.Ct. 252, 63 L.Ed. 566; Abrams v. United States, 1919, 250 U.S. 616, 619, 621, 626-628, 40 S.Ct. 17, 63 LEd. 1173; Whitney v. California, 1927, 274 U.S. 357, 366-367, 373, 374, 379, 47 S.Ct. 641, 71 L.Ed. 1095; Hartzel v. United States, 1944, 322 U.S. 680, 686-687, 690-694, 64 S.Ct. 1233, 88 L.Ed. 1534.

[16] In the words of the learned justice who coined the "clear and present" danger phrase: "I do not doubt for a moment that * * * the United States constitutionally may punish speech that * * * is intended to produce a clear and imminent danger * * *." Abrams v. United States, supra, 250 U.S. at page 627, 40 S.Ct. 17, 21.

The indictment charges and the jury by their verdict found that the defendants at bar spoke and otherwise acted "with the intent of causing the * * * overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit." See Dennis v. United States, supra, 341 U.S. at pages 508-511, 71 S.Ct. 857.

[17] Moreover, attention should not stray from the fact that the defendants here are charged with a conspiracy—a conspiracy to violate the Smith Act. Dennis v. United States, supra, 341 U.S. at pages 561, 572-574, 71 S.Ct. 857; Frohwerk v. United States, supra, 249 U.S. at pages 209-210, 39 S.Ct. 249, 63 L.Ed. 561; Goldman v. United States, 1918, 245 U.S. 474, 477, 38 S.Ct. 166, 62 L.Ed. 410. True, the conspiracy is to violate a statute which places some restraint upon freedom of expression. But as I read Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, the Supreme Court holds that the

statute, as there construed, fixes constitutional limitations upon the unqualified declarations of the First Amendment —having first found that the "clear" danger envisioned in the Smith Act lies in the proscribed advocacy or teaching with intent to bring about ultimately the overthrow of Government by means of force and violence, Dennis v. United States, supra, 341 U.S. at pages 499-500, 71 S.Ct. 857, and that "present" danger envisioned in the Smith Act consists in the specific intent of teacher or advocate to accomplish the objective of forcible overthrow as speedily as possible. Dennis v. U.S., 341 U.S. at pages 508-511, 71 S.Ct. 857.

[18] Accordingly, since the facts which reason permits to be found from the evidence in the case at bar, combined with the inferences which reasonably may be drawn therefrom, establish substantial proof of the essential elements of the offense charged, the evidence must be held sufficient to sustain a conviction within the meaning of Rule 29(a) of the Federal Rules of Criminal Procedure.

[19] As Mr. Justice Pitney put it in Pierce v. United States, supra, 252 U.S. at pages 251-252, 40 S.Ct. 205, 210, 64 L.Ed. 542: "There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal * * *. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide." See also Abrams v. United States, supra, 250 U.S. at page 619, 40 S.Ct. 17.

[20] The defendants also urge that there is a fatal variance in the proof. Specifically the contention is that

the only possible conspiracy shown by the evidence is one to violate the Smith Act by being or becoming a member of a proscribed "society, group, or assembly of persons • • • knowing the purposes thereof"; whereas the conspiracy charged is to violate the Smith Act by "advocating and teaching • • • [and by] helping to organize • • •."

It is true, as defendants say, that the evidence does establish proof of a conspiracy to violate those provisions of the Smith Act which forbid membership in a proscribed "society, group, or assembly of persons • • • knowing the purposes thereof," but the same evidence which establishes that proof also serves as proof of the charge set out in the indictment. For as stated before, the evidence as to a defendant's connection with, and position and activity and conduct in, the Communist Party is such as to permit the jury reasonably to draw the inference of membership in a conspiracy to advocate and teach and help to organize with the specific intent charged in the indictment.

[21] "Conviction upon a charge not made would be sheer denial of due process." De Jonge v. Oregon, 1937, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278. But conviction upon a charge made by means of evidence which would also support conviction upon a charge not made cannot possibly prejudice the accused.

[22, 23] Rule 52(a) of the Federal Rules of Criminal Procedure directs that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." In the language of Berger v. United States, 1935, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314: "The true inquiry, therefore, is not whether there

has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." Cf. Bennett v. United States, 1913, 227 U.S. 333, 338-339, 33 S.Ct. 288, 57 L.Ed. 531.

In my opinion these "obvious requirements" are fully met in the case at bar even though the evidence which sustains a verdict on the charge here made might also serve as more direct proof of a charge not made.

[24-145] Among the claimed grounds for a new trial, the defendants assert errors of commission and omission in the instructions to the jury. In preparing the instructions, I have drawn freely upon the charge given by Judge Chesnut in United States v. Frankfeld, D.Md.1952, 103 F.Supp. 48, affirmed, 4 Cir.1952, 198 F.2d 679, as well as the instructions of Judge Medina in United States v. Foster, S.D.N.Y.1949, 9 F.R.D., 367-394; affirmed sub nom. United States v. Dennis, 2 Cir.1950, 183 F.2d 201; affirmed 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, and have resolved doubts as to the law in favor of the accused. [The instructions to the jury are included as an appendix hereto.]

[146] Another ground advanced in support of the motion for a new trial is the contention that publication in local newspapers and over local radio and television

of news of an alleged "long-secret F.B.I. report" on the claimed objective of the Communist Party to overthrow the Government by force and violence deprived the defendants of a fair trial.

This report, the defendants assert, was designedly released by Director Hoover of the Federal Bureau of Investigation for publication "on the very eve of the case going to the jury," with the obvious intent of attempting "to get into the jury room * * * through hysterical headlines * * *."

At the time the matter was called to the attention of the court on the morning following publication, the defense had completed presentation of arguments to the jury, and the prosecution was in the midst of the closing argument. The court then offered to permit the defense to reopen argument to the jury, and later offered to make inquiry of the jury as to whether any of them had heard or read of the matter and, if so, whether any juror felt influenced by such extraneous publicity or felt unable for any reason to continue to sit with absolute impartiality and decide the case solely upon the evidence adduced in the courtroom.

At that time, before the case was submitted to the jury, and after pointing to the fact that four alternate jurors had sat throughout the six months of trial, the court advanced the suggestion that, in the event one or more of the jurors might have felt the influence of any such publicity, alternates could be called upon to serve. Spivey v. United States, 5 Cir., 1940, 109 F.2d 181, 186, certiorari denied, 1940, 310 U.S. 631, 60 S.Ct. 1079, 84 L.Ed.

1401; cf. United States v. Gale, 1883, 109 U.S. 65, 69, 3 S.Ct. 1, 27 L.Ed. 857.

The defendants preferred not to have the inquiry made as proposed, but requested the court to poll the jury with the single query whether any had heard or read of the report, it being the position of the defense that any further inquiry would be immaterial. See Reining v. United States, 5 Cir., 1948, 167 F.2d 362, 365, certiorari denied, 1948, 335 U.S. 830, 69 S.Ct. 49, 93 L.Ed. 383; cf. Bowers v. United States, 9 Cir., 1917, 244 F. 641, 649. The court declined to limit the inquiry as the defendants requested, and no mention of the matter was made in submitting the case to the jury other than to caution the jurors repeatedly that their verdict must be based solely upon the evidence in the case as adduced in the courtroom. See United States v. Griffin, 3 Cir., 1949, 176 F.2d 727, 731, certiorari denied, 1950, 338 U.S. 952, 70 S.Ct. 478, 94 L.Ed. 588.

Now, after a verdict of guilty, the defendants wish to support their motion for a new trial by themselves conducting among the jurors substantially the inquiry which the court offered to conduct before the case was submitted to the jury. To permit the inquiry following the conviction would avail the defendants nothing in the circumstances at bar, cf. United States v. McGrady, 7 Cir., 1951, 191 F.2d 829, 831; Bowers v. United States, supra, 244 F. at page 649, for as was said in United States v. Griffin, supra, 176 F.2d at page 731: "There is no proof that the jury or any member of it saw or heard the stories mentioned, but assuming that this did occur, there

is not the slightest reason for inferring that real harm resulted • • •."

[147] Moreover, subjecting the jurors to such an inquiry after verdict would be to violate without warrant the secrecy of the jury room. As Judge Prettyman, when sitting in the Fourth Circuit, so well said in Rakes v. United States, supra, 169 F.2d at pages 745-746: "The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

In Clark v. United States, supra, 289 U.S. at pages 12-13, 53 S.Ct. at page 468, Mr. Justice Cardozo observed: "The books suggest a doctrine that the argu-

ments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid."

Additionally, it should be noted that the Committee on Professional Ethics and Grievances of the American Bar Association has held, in Opinion 109 issued March 10, 1934, that "A lawyer ethically has no right, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions, * * *." [See American Bar Association Opinions of the Committee on Professional Ethics and Grievances, 212 (1936).]

It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial. Cf. Reining v. United States, supra, 167 F.2d at page 365. However, the comments of Mr. Justice Holmes in Holt v. United States, 1910, 218 U.S. 245, 250-251, 31 S.Ct. 2, 5, 54 L.Ed. 1021, seem singularly appropriate here: "* * * one of the grounds for demanding a new trial * * * involve[s] the question how far the jury lawfully may be trusted to do their duty when the judge is satisfied that they are

worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with anyone, and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case, while the trial was going on. * * * The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. * * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

These observations of the scholarly Justice, written for a unanimous court in 1910 before the advent of radio or television would seem *a multo fortiorari* sound today. United States v. Weber, 2 Cir., 1952, 197 F.2d 237, 239; United States v. Leviton, 2 Cir., 1951, 193 F.2d 848, 857, certiorari denied, with opinion by Mr. Justice Frankfurter, 1952, 343 U.S. 946, 72 S.Ct. 860; United States v. Keegan, 2 Cir., 1944, 141 F.2d 248, 258, reversed on other grounds, 1945, 325 U.S. 478, 65 S.Ct. 1203, 89 L.Ed. 1745.

[148] There has been no showing that the jury at bar did not function as a jury should function, free from all extraneous influence, in the best tradition of this outstandingly characteristic institution of the Anglo-American legal system. And the presumption is that the jurors faithfully performed their official duties. Baker v. Hudspeth, supra, 129 F.2d at page 782; Cavness v. United

States, 9 Cir., 1951, 187 F.2d 719, 723, certiorari denied, 1951, 341 U.S. 951, 71 S.Ct. 1019, 95 L.Ed. 1374.

Finding no errors in the conduct of the trial which can fairly be said to affect any substantial rights of the defendants, proper exercise of discretion requires that the motion for a new trial be denied.

[149] The motion in arrest of judgment does not warrant discussion in addition to what was said in United States v. Schneiderman, supra, 102 F.Supp. 87. Since the indictment does clearly "charge an offense", Dennis v. United States, supra, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, and this court concededly has jurisdiction of the offense charged, there is no reason to arrest judgment.

The defendants were lawfully and fairly indicted, tried and convicted. There appears no basis in fact or law to acquit, arrest the judgment, or order another trial.

[150, 151] The presumption of innocence, with which our common-law system of justice favors every defendant throughout the trial, ceased when the jury returned their unanimous verdict of "Guilty." That verdict being fully supported by the evidence, the law now presumes the facts to be as the jury found them.

The motion in arrest of judgment is denied. The motion of each defendant for a judgment of acquittal and the alternative motion for a new trial are also denied.

Appendix C

Copied verbatim below is Appendix A to Appellee's brief in the court below, omitting, however, the sections relating to those appellants who are not parties to this petition. Where the Appendix refers to sections of the brief itself, those sections are added as footnotes. In a few instances it has been necessary for petitioners to set forth some facts which have been omitted, to make a comment with respect to a conclusion and to correct one error. In each instance the added language is italicized and in brackets.

"Most of the activities of appellants have been set forth in the Statement of Facts. However, to afford the Court a convenient reference, the activities of appellants in the Communist Party have been collated below.

"One of the principles of Party organization which Lenin stressed is the principle that the Party must include 'a close circle of regular cadres of leading Party workers, chiefly professional revolutionaries' [Ex. 28, p. 33; see [A. 15 and supra, p. 165]. The facts bearing an appellants' character as 'professional revolutionaries' may be summarized as follows:

"*Oleta O'Connor Yates.*

"In 1933 appellant Yates joined the Communist Party [R. 10250] and was a member of the Communist Party in 1935 [R. 455] and continued to be a member of the Party and a functionary or officer of the Communist Party or of the C.P.A. up until the time of trial. In 1936 Yates was organizer of the San Francisco County

Communist Party and a member of the District Committee of District 13, Communist Party U.S.A. She was Educational Director for the Communist Party of San Francisco County and was a delegate to the 1936 National Convention of the CPUSA. In 1937 Yates assisted in conducting a California State Educational and Training School for the Communist Party in San Francisco [A. 6, 8; R. 455, 458; Exs. 522, 523, 524, 525, 584, 631, 632, 633, 634]. In 1936 and 1937 Yates, when a member of the state organizational committee, lectured at California State Communist Party Leadership Schools and used Exhibit 61, "*The Communist Party, a Manual on Organization,*" by J. Peters, in her lectures [A. 8, 9, 248-249; R. 523].

"In the later part of 1937 Yates was present as a member of the District Committee for District 13, Communist Party U.S.A. when appellant Schneiderman read a letter from the National Committee of the Communist Party concerning the setting up of the *People's World* (see *supra,* pp. 86-87),* and was present at meetings of the District Committee when the editorial policy of the *People's World* was discussed (A. 3-6).

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*"In December, 1937, Richmond was selected by the Central Committee of the Communist Party, United States of America, to become managing editor of the new *People's World* (Ex. 636; A. 10), and, in the latter part of 1937, attended a meeting of the District 13 Committee with appellants Schneiderman, Yates and also Harry Kramer, who was the Business Agent of the *Western Worker* and a member of the Communist Party, and heard Schneiderman read a letter from the National Committee, requesting the expediting of 'the setting up of a daily press in California.' At this meeting steps were then taken to form a new paper; subscribers to the *Western Worker* were to automatically become subscribers to the *People's World* (A. 3-4)." (Appellees Br. pp. 86-7.)

"In 1944 Yates was Chairman of the Communist Party and the Communist Political Association of San Francisco [Exs. 565, 563; A. 378] and was a member of the State Committee of the California Communist Political Association [Ex. 415; A. 126-127] and an alternate member of the National Committee of the C.P.A. [Ex. 415; A. 131-132], having attended the National Convention of the Communist Party in 1944 (A. 429).

"According to the witness Van Dorn, Yates had office space in the County or State headquarters of the Party in San Francisco in 1944 until the witness left the building in June, 1948 (A. 363-367) and attended many San Francisco County and California State Board meetings at the Party headquarters in San Francisco at night during this same period [A. 358-361; R. 7771-7780]. In addition, Yates taught a Marxist class at the Communist Party State Headquarters in February, 1945 (A. 369).

"In April, 1945, Yates attended a Party meeting in honor of 'Mother Bloor' in San Francisco at which Mother Bloor said that the day of revolution was near—that 'we were on the threshold of this revolution' and that 'we are prepared to the point that we have arms awaiting for us.' (A. 372). Mother Bloor further stated, 'I am 83 years old and I will live to see this bloody battle through.' 'There will be blood flowing in the streets.' [A. 369-372; R. 7813-7823]."

[*On cross-examination the witness conceded that Mother Bloor at this meeting said, "I am happy to have lived to see the eve of our great victory over fascism. • • • It is wonderful that all the peace-loving nations of the world are gathered in San Francisco to form the United*

*Nations which should be the basis for a lasting peace. * * * The forces of fascism are on the run and you and I will live to see the final victory over the forces of fascism," and that she talked "about the great loss that this country had incurred upon the death of Mr. Roosevelt who had died a few days earlier"—that "she said we had lost our best friend, that he has stood beside us, and that we don't know about Truman, that we are going to give him a trial." (R. 8002-3).]*

[She testified that the reception was held at the home of a Mrs. Batchelor, who she did not know to be a Communist Party member, that she received a printed invitation to the reception which she did not turn over to the Federal Bureau of Investigation although she was reporting to it, that there were less than fifty persons at the reeception and that she knows of only two in attendance who were not Communist Party members but there might have been others, that the two she knew of were ladies who were neighbors of Mrs. Batchelor who invited them there.]

[A number of photographs of the persons present were taken at this reception (R. 8003-4). Mrs. Batchelor, at whose home the meeting was held, testified that she was not a Communist, that her house was rented for the reception, that none of the blood and thunder statements attributed to Mother Bloor by Daisy Van Dorn were made, that the reecption was to such an extent an open one that there was present at it a young man who just happened to be staying with her at the time (R. 12113-17, 12127).]

(The appellant Yates testified that the affair was not a Communist Party affair, that it was purely social, that

Mother Bloor did make a speech but that there was no truth to the version of the speech given by the witness Daisy Van Dorn on direct examination.]

"Yates attended both sessions of the State Convention of the Communist Party in July and August, 1945, in San Francisco [A. 14, 15, 16; R. 616-621] and from September, 1945, to August, 1948, was President or Chairman of the Communist Party of San Francisco [Exs. 567, 568; A. 147; R. 5456].

"In 1946 Yates collaborated with appellant Carlson in preparing Exhibit MF, '*A Handbook for Club Officers*' (A. 387, 388)."

[*This outline describes activities of Communist clubs indicating that the aim and purpose of such activity is to bring understanding of the need for socialism and to win improvements in the conditions of workers. It urges activity in support of such issues as jobs and wages, fair employment practices, peace, election campaigns, etc. The methods by which these activities are to be carried on include "open meetings, state meetings, forums, leaflets and bulletins, use of Party press and literature, circulation of petitions, issues, organization of letter-writing campaigns, organizing mass delegations around issues, organizing actions on grievances" (R. 11057).*]

"(See discussion *supra*, pp. 65-66.)"*

"In May or June, 1946, Yates spoke to a Communist Party meeting in San Francisco attended by appellants

*"The club, as the basic unit of the Party, functions under its club officers. It has a club executive committee which is 'accountable to county or state committee for work of the club during its term in office' (Ex. MF, p. 9). The officers of the club, besides

Schneiderman, Lambert and Lima. In October or November, 1946, Yates attended a Party meeting in San Francisco at which appellant Fox stated that the Party was a revolutionary Party and that he wanted to see the overthrow of 'this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not arrived yet' (A. 148-150). In November or December, 1946, Yates was the main speaker at a Communist Party meeting in Los Angeles attended by appellants Healey, Dobbs, Steinberg, Chernin and Spector (A. 135-136). Yates contributed an article entitled 'The Struggle Against Deviations and Factionalism in San Francisco' for the December, 1946, issue of

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the foregoing, are the club chairmen, educational director, membership and dues director, literature director, press director, and finance secretary (Ex. MF, p. 2)."

"In connection with the educational director's responsibilities for education of the club, there is included the use of reports of the national or state committee meetings. *Political Affairs* and outlines issued by state or county educational committees (Ex. MF, pp. 11-12). Among the duties of the membership and dues directors is that of seeing that new members are told of the 'compulsory attendance at new members' classes' (Ex. MF, p. 13). Further, after the new member has been accepted and enrolled in a new members' class, the membership director must inform the county educational directors of this (Ex. MF, p. 13). Any club member moving to another club must obtain a transfer card from the membership director (Ex. MF, p. 13). No member can be placed on the rolls of any club until transfer has been cleared by the county membership director (Ex. MF, p. 14). The literature director's job is inseparably related to strengthening the Party by the members' reading and studying Marxist-Leninist books and pamphlets (Ex. MF, p. 14). The type of liternature 'should be discussed with the county literature director' (Ex. MF, p. 15). The role of the press director is important since press building is an important part of the Party's fight to win the workers from bourgeois to proletarian idealogy (Ex. MF, p. 15), and a press director is important in 'showing how the editorials in the PW (People's World) are a guide to action from the state and county committees, for every member and branch' (Ex. MF, p. 15)." (Appellee's Brief, pp. 65-6.)

Political Affairs [Ex. 639; A. 157-159, 597] which was the official publication of the CPUSA (A. 408).

"In February, 1947, Yates attended a Communist Party meeting in San Francisco where appellant Schneiderman spoke on 'Left Sectarianism' and 'Right Deviations' and said that the ultimate goal of the Party was the establishment of socialism which could only be brought about through violent revolution (see *supra*, p. 109;* A. 146-147)."

[*The same witness who described this alleged speech testified also at length as to his own Marxist training while a member of the Communist Party. Thus he said he had been taught that a transition, however accomplished, from capitalism to socialism would be "a drastic change", hence a revolution (R. 4913). Further he learned that some part of the process would be violent, because the minority would not permit the majority to effect such a change peacefully (R. 912-13), that when*

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*"The last evidence we have of this left sectarian factionalism in the Party concerned a general county meeting of the Communist Party in February, 1947, at which appellant Schneiderman spoke after he had returned from the annual plenum meeting held in New York December, 1946. This was also attended by appellant Yates. Schneiderman made further remarks in relation to the situation in San Francisco and the expulsion of the left sectarian elements. Schneiderman said that he wanted to assure the Party that 'they were on a purely Marxist-Leninist line, which was the playing of a revolutionary role in society.' He reviewed the San Francisco situation and claimed that many of the persons who were expelled from the Party had formed anti-Party super left groups and that 'again they were like the horse that was too far ahead of the cart, and the party did stand for revolution and he wanted to assure the members of that,' and that 'he doubted if most of the members realized the seriousness of revolution and that revolution meant bloodshed and tragedy and the loss of lives and property, and that these things were expendable in the long run in the fight for socialism' (A 172-173). (See infra, App. A, p. vi.)" (Appellee's Brief, pp. 109-110.)

the majority of the American people would exercise their free choice to establish socialism, the minority would not be willing to accept the wishes of the majority (R. 4902-03). He also heard discussions during 1948 of the perspective of a peaceful change from capitalism to socialism (R. 4876), as embraced in William Z. Foster's The New Europe (Ex. BA), though this was a matter with which he "was not too much concerned" (R. 4877), in which he "wasn't too much interested" (R. 4878).]

"In September, 1947, Yates attended a meeting in San Francisco in which co-conspirator William Z. Foster spoke [R. 4481-4482]."

[*All of the defendants in Dennis are named in the indictment as co-conspirators and they are constantly referred to as such by respondent. However, there was no evidence of any agreement or conspiracy between said Dennis defendants and the petitioners here.*]

"In 1947 Yates assisted in the reregistration of club members in San Francisco (A. 282-284) and in the installation of new club officers on an occasion when she opened a fund drive for the Daily People's World (A. 234-235). In April, 1947, Yates was Chairman of a Party meeting in San Francisco composed of club chairmen 'concentrating on transportation' [R. 5458-5459]. Between December, 1947, and July, 1948, Yates attended approximately two dozen secret meetings of the State Committee of the Communist Party of California at the home of witness Bessie Honig in San Francisco (A. 223-241).

"In 1949, Yates was still Chairman of the Communist Party of San Francisco [Exs. 583, 560] and with the as-

sistance of appellant Schneiderman prepared a 'Study Outline' for the Marxist Institute [Ex. 163; A. 397].

"Exhibit 181, 'The Party Review' Preconvention Discussion Bulletin circulated in the California Party in 1950 announced that the State Committee had set up a special committee composed of Yates, appellant Al Richmond and Hursel Alexander to help develop the preconvention discussion and instructed that articles for the Party Review should be addressed to Yates [Ex. 181; A. 99, 579]. Yates was a member of the California State Committee of the Communist Party in 1950 (A. 418) and attended the California State Convention of the Communist Party in San Francisco in December, 1950, at which the appellant Schneiderman was elected a delegate to the National Convention (A. 403-404). In April, 1951, a letterhead of the Communist Party identified Yates as State Secretary of the Communist Party [Ex. 538] and in June, 1951, she was introduced to a Communist Party meeting as State Organizational Secretary. In 1951, Yates in connection with her duties as an official of the Communist Party met with leaders of the Party at the Communist Party headquarters in Los Angeles, particularly with appellant Carlson (A. 394-395).

"At the trial, Yates testified that she was State Organizational Secretary of the Communist Party of California, having acquired this position toward the end of 1950 and had the duty of helping organize recruiting to build the Communist Party, of organizing mass campaigns and checking upon the payment of dues in various sections of the Party (A. 393-394).

"*Henry Steinberg.*

"In 1936 Steinberg attended meetings of YCL leaders in Los Angeles with appellants Dobbs and Carlson. In June or July, 1940, Steinberg with appellant Connelly attended a county committee meeting at Communist Headquarters in Los Angeles when a discussion of the impending election campaign and of the Communist campaign for Southern California was discussed, also, the Communist slogan 'Don't Support the Imperialist War,' 'Vote Communist,' 'Vote for Browder and Ford' were discussed. At this time Steinberg had come into his own as a practical politician of the Communist Party (A. 247-248).

"In July, 1940, Steinberg was a registered Communist in San Francisco County, California [Ex. 521; A. 454]. In the summer of 1940, Steinberg ran for public office on the Communist ticket [Exs. 516, 557; A. 454]. In November, 1942, Steinberg attended a County committee meeting of the Los Angeles County Communist Party in the Headquarters of the Party in Los Angeles (A. 256-257). In March, 1943, Steinberg was a registered Communist in Los Angeles County, California [Ex. 518; A. 454]. In December, 1946, or January, 1947, Steinberg was Educational Director of the Los Angeles County Communist Party (A. 138-139).

"In January, 1949, Steinberg was Chairman of the Lenin Memorial Meeting sponsored by the Los Angeles Communist Party at which appellant Dobbs was the main speaker [Exs. 737, 159-B; A. 207-211]. In May, 1949, Steinberg attended a Communist Party meeting in San

Diego, California, at which the appellant Schneiderman spoke (A. 29-30). In March, 1950, Steinberg was Legislative Director of the Los Angeles County Communist Party [Ex. 517; A. 455]. In the spring of 1950, Steinberg attended a Daily People's World circulation drive meeting in Los Angeles (A. 95-96). In 1950, Steinberg attended a closed Party meeting in Los Angeles while he was running for the Board of Education, where he talked on the *People's World* drive, and protested the jailing of co-conspirator Dennis (A. 98-99). In May, 1950, Steinberg was advertised as one of the speakers at the May Day, 1950, meeting sponsored by the Educational Committee of the Los Angeles County Communist Party [Ex. 358; R. 2828]. In October, 1951, Steinberg and appellant Healey were advertised as the speakers at a rally sponsored by the Los Angeles County Communist Party [Ex. 359; R. 2844-2847].

"Loretta Starvus Stack, also known as Loretta Starvus and Lottie Kieth.

"In 1932, appellant Stack was known to witness Patterson as Lottie Kieth, Patterson, in the National Offices of the Young Communist League in New York, upon the instructions of co-conspirator Gilbert Green, National Secretary of the Young Communist League, gave a lecture to Stack and others who were going to Russia to attend the International Lenin School. In the fall of 1934 Patterson talked with Stack upon her return from the Lenin School in Moscow in the District Offices of the Young Communist League in Philadelphia, at which time Stack informed Patterson that she had received instruc-

tions in the Lenin School about using automobiles, buses and street cars for barricades to protect the revolutionists in their fighting, and that she had been instructed that it was her duty upon her return to the United States to prepare the Party apparatus for "illegal work, but at the same time, to try to stay legal as long as they could. But in the event that there is an attempt on the part of the American Government to drive the Party underground, that the Party apparatus would be intact, and it would function right along." Stack further told Patterson that the Lenin School had definitely established that the dictatorship of the proletariat could only come about as a result of the overthrow of the Government in the respective countries; and 'that it was the duty of the students of their respective countries to work to overthrow their own Governments and to set up the dictatorship of the proletariat as a guarantee that the Government that was overthrown would not regain its power.' Stack told Patterson that while at the Lenin School, she had received training in the use of bayonets. Stack was a member of the District Committee of the Young Communist League in 1934 in the Philadelphia District [A. 213-220, 222, 223; R. 5354-5387; R. 5760-5761].

"In 1945 Stack was a delegate from the California Communist Party to the National Convention of the Communist Party in New York (A. 72-73). In August, 1945, Stack, then known to witness Wereb as Loretta Starvus, was elected a member of the State Committee of the Communist Party [A. 124-125; Ex. 398; also A. 130], and in accepting her election to the State Board Stack said that the American workers would be the grave-

diggers of the capitalist government and urged that Marxist-Leninist rules be reinstated all over.*

"From the end of 1945 until about June, 1948, Stack had office space at the Communist Party Headquarters in San Francisco (A. 364-365). At least from October, 1945, through March, 1949, Stack was a prominent member of the Communist Party in California and was Secretary or Organizational Secretary of the Communist Party in California [Exs. 533, 562, 564, 566, 569, 570, 577, 582; A. 446-452]. Appellant Yates became Organizational Secretary toward the end of 1950 (A. 393)."

"In August, 1946, Stack spoke at a Communist Party Convention held in Los Angeles, at which she said that the Communist Party was the instrument through which the capitalist government would be overthrown, and a social form of government set up (A. 29, 30). In December, 1946, Stack spoke at a Los Angeles County conference of the Communist Party as a 'comrade' from San Francisco and said that the poor conditions under capitalism should spur the Party into working for socialism 'in our time in the United States' (A. 306). In the spring of 1947, Stack was Organizational Secretary of the California Communist Party (A. 238). Between December, 1947, and May, 1949, Stack attended secret meetings of the State Board of the California Communist Party at the home of witness Bessie Honig (A. 223-231).

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*"See Exhibit 39, the *Communist Manifesto*, page 21: 'What the bourgeoisie therefore produces, above all, are its own grave diggers. Its fall and the victory of the proletariat are equally inevitable.'

"Loretta Starvus (appellant Stack) made a report entitled: 'Major Problems in Party Building' to the 1948 State Convention in which she commented on how the Party was reconstituted from its 'revisionist period to a Leninist concept . . . a Marxist Party that shall function as the vanguard of the working class, coordinating and directing the class struggle of the proletariat.' Stack further urged emphasis upon building the Party among the industrial workers as the only way to achieve the Party's political objectives. Others reporting to the convention were appellants Schneiderman and Richmond and co-conspirator John Williamson [Ex. 186; A. 580-581].

"In October, 1948, Stack as Organizational Secretary of the California Communist Party, spoke to a Party meeting in San Francisco on the 'Woman Question,' and said that the Party should occupy the highest position in a person's life and that Party policy should take precedence over family life. Stack referred to the historic role that women played in bringing about the Russian Revolution and said that the women of today must take the same role in bringing about the revolution." [*The following two sentences are in error. The statements referred to were not made by petitioner Stack, but by some third person outside of petitioner's presence and knowledge at a school with which petitioner was not shown to have had any connection.*] "Stack further said that the change from capitalism to socialism would be 'a dynamic thing, something of a force, that we wouldn't just go right easily into socialism. That the prerequisite, the preconditions for the socialist society would have to

be developed over a period of time, but the change would be a violent thing, something that would happen over night . . .' (A. 117-120).

"In 1948, the name of Loretta Starvus was carried on the letterhead of the Communist Party of California as Organizational Secretary [Ex. 315]. In 1950, Stack was a member of the California State Committee of the Communist Party (A. 418). Appellant Yates testified in June, 1952, that in connection with her duties as an official of the California Communist Party, she had been in touch with Stack many times within the past five years (A. 396).

"*Frank Efriom Spector.*

"'Two Decades of Progress' from 1919 to 1939, issued by the Los Angeles Communist Party in September, 1939, refers to Frank Spector on page 16 as a 'pioneer leader of the Communist Party in Los Angeles' [Ex. 611]. Witness Nat Honig met Spector in 1934, during which period Honig was the representative of the American Communist Party to the Red International Labor Unions in Moscow, U.S.S.R. (A. 332). In 1935 Spector participated in a meeting of the State Committee of the Young Communist League in San Francisco (A. 243-244). Witness Saunders recalls that Spector came to San Francisco from New York about 1936 to become Organizer of the San Francisco County Communist Party, and that he still held this position in 1940 (A. 12). In 1936, Spector attended underground meetings of the County Committee of the Young Communist League in Los Angeles (A. 262-264). Early in 1937, Spector at-

tended a District Committee meeting of District 13 of the Communist Party, at which time, he was San Francisco County Secretary of the Party (A. 5-6).

"In 1940 or 1941, Spector protested to witness Lautner the decision of the Communist Party that non-citizens could not be a member of the Party and declared that he had a right to be a member of the Communist Party; that he was a proletarian and had a right to belong to a working class party and he was going to fight for his right to remain a member of the Party [A. 45-46; R. 2039-2043].

"In the summer of 1945, Spector participated in a Communist Political Association Meeting in Los Angeles (A. 307). In November or December, 1946, Spector attended a Communist Party Meeting in Los Angeles at which appellant Yates was the main speaker and which was attended by appellants Healey, Steinberg, Dobbs and Chernin (A. 135-136). In December, 1946 Spector conducted classes in Hollywood (A. 307-310) and instructed the class to read the chapter on 'The Party' in *Foundations of Leninism* [Ex. 1], a pamphlet entitled 'Mastering Bolshevism' by Stalin, and *'The United Front Against Fascism,'* by Georgi Dimitrov [Ex. 119].

"On September 15, 1947, Spector and others advised witness Russell that he was suspected of being a spy in the Party and questioned him on the extent of his Marxist reading. Spector told Russell that the reading of the *Communist Manifesto* [Ex. 39], *Foundations of Leninism* [Ex. 1], 'Mastering Bolshevism,' Wage, Labor and Capital, by Marx, Value, Price and Profit by Marx, and the *History of the CPSU* [Ex. 28] constituted a remarkably

small amount of reading for the Educational Director of a club, the position which witness Russell held, and said that a person in a position of such responsibility ought to be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members. Thereafter, Spector and his friends searched witness' wallet and his room (A. 310-312). At a session of a Communist Party Section Leadership Training School held in May or June, 1949, a Section Educational Director of the Los Angeles County Communist Party announced that at the next meeting, Frank Spector would be the instructor on the topic of 'The State' (A. 297). In September, 1949, Spector attended a Communist Party meeting in Los Angeles, at which appellants Healey and Dobbs spoke (A. 291-292).

"In the fall of 1950, 'The Party Review,' a pre-convention discussion bulletin published by the California State Organization of the Communist Party [Ex. 181] contained an article by Frank Spector entitled, 'On "Subjective Reactions" and "Political Vacations" Among Left Progressives in the Trade Unions' in which he castigated the Communists and left-progressives who had been driven from the leadership of the unions, for failing to fight back, because now the bosses and their agents were able to 'chain them (the unions) to the imperialists' policies of war abroad and fascism at home' [Ex. 181, p. 3].

"In May, 1950, Spector was introduced to a functionaries' meeting of the Southern Division of the Los Angeles County Communist Party as Organizer of the Southern Division (A. 292-294).

"*Albert Jason Lima, also known as Mickey Lima.*

"Evidence shows that Lima was an active Communist from at least June, 1940 to April, 1943 [Exs. 554, 520, 553, 528, 527, 537, 539; A. 452-458]. In 1945 he was a Field Organizer for the Communist Party working out of the San Francisco office of the Party and attended the 1945 State Conventions of the Communist Party (A. 12). Lima had office space at the State Headquarters of the Communist Party in San Francisco from the end of 1945 to at least June, 1948 (A. 362-364). *Struggle Against Revisionism* published by the Communist Party of the United States in January, 1946, reflects that Lima was a member of the National Committee of the Communist Party along with appellant William Schneiderman and co-conspirators William Z. Foster, Eugene Dennis, John Williamson, Robert Thompson, Benjamin J. Davis, Jr., Jack Stachel and Irving Potash [Ex. 650; A. 598].

"The '*May Day Rally*' program for May 7, 1947, in Los Angeles, California, reflects that Lima, a member of the National Committee of the Communist Party United States of America and Assistant State Organizational Secretary, was advertised as the main speaker [Ex. EA].

"In May or June, 1946, Lima attended a Communist Party meeting in San Francisco, also attended by appellents Schneiderman, Yates and Lambert (A. 150-153).

"In February, 1947, Lima attended a Communist Party meeting in San Francisco at which appellants Schneiderman, Yates and Lambert were present and at which appellant Schneiderman spoke on 'left sectarianism' and 'right deviations' and assured those present that the

Communist Party was a revolutionary Party, but that the time had not yet come for revolution and that the Communist Party's ultimate goal was the establishment of socialism which could only be established by violent revolution (R. 145-147)." [*For further details regarding this alleged incident see the section dealing with petitioner Yates,* p. 152, *supra*]. "In July, 1947, and in December, 1947, Lima held the title of Secretary of the Communist Party of California [Exs. 561, 569; A. 447].

"A letterhead of the Communist Party of California, State Office, circulated in 1948 reflects that Lima had the title of 'Field Organizer' [Ex. 315; R. 6717, 6723, 6728, 6729].

"Between December, 1947 and May, 1949, Lima attended approximately two dozen secret meetings of the State Board of the Communist Party of California at the home of Bessie Honig in San Francisco (A. 223-231).

"In December, 1950, Lima, as Chairman of the East Bay Region (consisting of Contra Costa and Alameda Counties, California) attended the West Oakland Convention of the Communist Party held in Berkeley, California (A. 109-111); also, in December, 1950, following the West Oakland Convention, a Party meeting was held in Berkeley, California, for the purpose of electing delegates to the California State Convention of the Communist Party, at which meeting 'Lima was elected a delegate to such State Convention' [A. 114; R. 3574-3575]. In January, 1951, Lima, as Chairman of the East Bay Region of the California Communist Party was in charge of proceedings at an East Bay Regional Convention held in two sessions in Oakland and El Cerrito, California,

and which was attended by appellants Schneiderman and Richmond.

"Carl Rude Lambert.

"In 1935 Lambert was responsible for the security of the Party in California (A. 249-250). In 1936 Lambert was observed at Communist Party Headquarters in California and was then on the Party Control Commission (A. 12). In 1936 Lambert attended underground meetings of the Los Angeles County Committee of the Young Communist League in Los Angeles (A. 262-264).

"The evidence reflects that Lambert occupied an important position in the Communist Party District 13 or in the Communist Party of California either as an officer or member from 1939 to 1949 [Exs. 574, 572, 582, 564, 571, 556, 563; A. 446-449]. When Lambert was Treasurer and Assistant Treasurer of the Communist Party (see foregoing exhibits), he maintained an office at the Communist Party State Headquarters in San Francisco during 1944 and the early part of 1945 (A. 364). During 1945 Lambert attended meetings of the State Board of the Communist Party and of the County Board of the San Francisco County Communist Party in the Headquarters of the Communist Party in San Francisco during 1945 (A. 359). In April, 1945, Lambert attended a Party meeting in honor of 'Mother Bloor' in San Francisco at which Mother Bloor said that the day of revolution was near—that 'we were on the threshold of this revolution' and that 'we are prepared to the point that we have arms waiting for us.' Mother Bloor further stated, 'I am 83 years old and I will live to see this

bloody battle through. There will be blood flowing in the streets' [A. 369-372; R. 7813-7823]." [*For further details regarding this alleged incident see the section dealing with petitioner Yates*, p. 148 et seq., *supra*.] "In June, 1945, Lambert was at the Headquarters of the Communist Political Association in San Francisco and attended the convention held in San Francisco in June, 1945 (A. 13). In May or June, 1946, Lambert participated in a Party meeting in San Francisco and spoke as head of the Security Committee of the Party against persons accused of anti-party activity (A. 150-153). In the latter half of 1946 Lambert was introduced to witness Bessie Honig at the State Headquarters of the Party in San Francisco as head of Party Security (A. 235).

"In October or November, 1946, Lambert attended a Party Meeting concerned with the expulsion of two members for 'left sectarianism' at which appellant Fox declared that the Party was a revolutionary party and that he wanted to see the overthrow of 'this lousy system just as much as anybody else present, but there was a time and place for militant action and that it had not arrived yet' (A. 148-150).

"In February, 1947, Lambert attended a Party meeting in San Francisco where appellant Schneiderman spoke on 'left sectarianism' and 'right deviations' and assured the members that the Communist Party was a revolutionary party, but that the time had not yet come for action. Scheiderman pointed out that revolution meant tragedy, violence and bloodshed and that the ultimate goal of the Party was the establishment of socialism which could only be established through a violent revolu-

tion (see Schneiderman, *supra;* A. 145-147)." [*For further details regarding this alleged incident see the section dealing with petitioner Yates,* p. 152, *supra.*]

"In the Spring of 1947, Lambert addressed a joint Party club meeting in San Francisco as head of Party security and advised the members how to protect themselves from the F.B.I. and related the histories of some people (including his brother, Walter) expelled from the Party (A. 235-236). In December, 1947, or July, 1948, Lambert attended about two dozen secret meetings of the State Board of the Communist Party of California in San Francisco (A. 223-231). Early in 1948, Lambert attended a functionaries' meeting of the Los Angeles County Communist Party at which the appellant Dobbs compared the Daily People's World (see *supra*) as having a similar role in the United States as 'Pravda' had in the revolutionary movement in Russia [A. 186-189; R. 4979-4989].

"In June, 1948, Lambert attended a Party meeting in San Diego as Chairman of the Security Commission of the California Communist Party (A. 27, 28). On June 17, 1949, Lambert attended a meeting of the Chico Club of the California Communist Party and said that he was there as Chairman of the State Security Board of the Communist Party to settle a dispute between two members concerning union activities (A. 327). On July 20, 1950, Lambert again attended a meeting of the Chico Club of the California Communist Party and said that he was there concerning charges that had been filed against witness Sutherland, and that the State Board had recommended that Sutherland be expelled. Lambert

further said that they were 'purging the Party' for emergency or revolution, and said that the European crisis or the Korean crisis might determine how soon the revolution would come. Lambert was asked by witness Sutherland, 'Are you really planning revolution by bullets instead of ballots?' Hursel Alexander, in Lambert's presence, answered 'just what the hell do you think we are purging the Party for?' (A. 328-329; R. 7617-7620)."

[*On cross-examination the witness Sutherland admitted that several charges had been leveled against him by the Communist Party but that they were finally "trimmed" down to the charge of chauvinism. He stated that it was a common practice in the Communist Party to expel from the Party any white members who exhibited any feeling of superiority over Negroes. He admitted that he was specifically charged with attempting to cheat a Negro out of a piece of real estate for the sum of $250; however, he stated that the amount of money involved was incorrect. He further admitted that there was a charge against him concerning his carrying a gun at a time when he was distributing leaflets in behalf of the Communist Party. He denied that he was actually carrying a gun but admitted that he was severely criticized by the Party because it was believed that he was carrying a gun (R. 7664-68).*]

"*Rose Chernin Kusnitz, commonly referred to as Rose Chernin.*

"In April, 1943, Rose Chernin was Section Organizer of the Bronx Section of the Communist Party, Bronx,

New York, and addressed a meeting in that month in which she urged increasing the Communist Party membership and the necessity for women becoming more active in the Party due to the men joining the Armed Forces (A. 317).

"In the summer of 1945, Mrs. Kusnitz attended the New York State Convention of the Cominunist Party in New York (A. 45).

"In November, 1946, Mrs. Kusnitz attended a Communist Party meeting in Los Angeles on an occasion when the appellant Schneiderman urged the demobilization of all United States Armed Forces, the removal of all labels from American relief goods sent anywhere in the world and urged that Marxist training be immediately started in the Party and stated that free elections in this country could only serve the purpose of the Fascists (A. 133-135).

"In November or December, 1946, Chernin attended a Communist Party meeting in Los Angeles at which appellant Yates spoke on the influence of the Soviet Union in various countries and said it was only through the support of the Soviet Union that it would be possible for Marxism to succeed (A. 135-136).

"As Organizational Secretary, 66th Assembly District Section, Los Angeles County Communist Party, Chernin contributed an article in Exhibit 182 'Pre-convention Discussion Bulletin No. 2' issued by the California State Committee of the Communist Party, June 25, 1948, entitled 'Party Building and the Fight for Negro Rights' in which Chernin stated that they had held training semi-

nars in her section to solve the leadership problems in the section and referred to the improvement achieved in the sale of the *People's World* and in the obtaining of subscriptions to the *People's World*. Chernin also referred to the fact that the section had undertaken a quota of 75 recruits in the Party Building Drive [Ex. 182; A. 581-582].

"In August or September, 1949, Mrs. Kusnitz left her position as a Section Organizer of the West Jefferson Section, Los Angeles County Communist Party, and became the Organizational Secretary of the Midtown Division,* Los Angeles County Communist Party (A. 356). In June, 1950, Mrs. Kusnitz was Chairman of a Midtown Division Meeting of the Los Angeles County Communist Party held in connection with the Daily People's World Fund Drive and as Chairman received funds collected in the drive from representatives of various clubs of the division (A. 356-357).

"*Ernest Otto Fox.*

"In 1935, Fox was Organizer for the Communist Party in Seattle, Washington (A. 10). In 1936, Fox attended a Communist Party caucus of trade unionists in San Francisco (A. 249). Between 1944 and 1948 (A. 368), the witness Van Dorn observed Fox going up to the State Headquarters of the Communist Party in San Francisco for State Board meetings at night 'eighty to one hundred times' (A. 366-368). About October, 1946, Fox

*"Apparently, three different schools of the year-long Marxist Institute were held in the Mid-town Division while appellant Kusnitz was its Organizational Secretary, in view of the Directive that such schools be set up in the Division [Ex. 204].

participated in a Party meeting in San Francisco concerned with the expulsion of two members for 'Left Sectarianism' and denied that the party was still influenced by the Browder policies and declared that the party was a revolutionary party but that the party 'was not going to stick its neck out' and get its 'head chopped off.' Fox stated that he 'wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action, and it had not arrived yet' (A. 148-150).

"In 1946 Fox attended an executive session of the Warehouse Club of the Communist Party in San Francisco and became a member of this club in January or February, 1947, and in the latter part of 1947 and the first half of 1948, Fox became Chairman of the Warehouse Branch of the Party, which was then called the Joe Galdo Club [R. 4394-4395; A. 283]. Early in 1948, when Fox was being considered for Chairman by the Joe Galdo Club, it was decided that such a position might jeopardize his citizenship; subsequently it was announced at a club meeting that the County Organization in San Francisco did not approve of the club's action in regard to Fox and that the County directed that Fox be chairman of the Club (A. 285). In 1948 secret meetings of the State Board of the Communist Party were held at the home of witness Bessie Honig in San Francisco (A. 225) which were attended by Fox (A. 230-231). In the summer of 1948 Fox attended a party meeting in San Francisco and urged better organization of the Haskell Section of the party (A. 284): In 1948 Fox maintained a complete set of the Little Lenin Library in his home (A. 289).

"In the summer of 1948 Fox told the witness Addy that he had attended a secret National Party School in New York and had been a delegate to a party convention in New York without specifying the dates of these events [A. 286; R. 6598-6603]. In 1949 Fox became the Organizer of the Waterfront Section of the Communist Party in San Francisco (A. 288), having been Chairman of the Haskell Section of the Party until that time (A. 283).

"Exhibit 177, 'Our Party, Preconvention Bulletin No. 4,' issued by the Communist Party, U.S.A., was circulated throughout the Party about September 1951 [R. 2831], reflects that Fox was Maritime Section Organizer for the Party in San Francisco and contributed an article in this exhibit entitled: 'Weaknesses in our Maritime Work' [Ex. 177; A. 579]. A preconvention Discussion Bulletin was issued and circulated throughout the party by the California State Organization in the Fall of 1950 which reflects that Fox was Maritime Section Organizer in San Francisco and contributed an article in this exhibit entitled: 'The Right Opportunist Obstacles to Work in the Maritime Industry' [Ex. 181; A. 579; R. 2832].

"*Ben Dobbs.*

"Appellant Dobbs was a member of the YCL from 1932 [R. 6136-6137] to 1945 (A. 11). In 1933 Dobbs attended discussion group meetings of the YCL (A. 243). In 1935 Dobbs was in San Francisco and was then Director of the YCL. In the early part of 1935, Dobbs led discussions among leaders of the YCL in the offices of the YCL in Los Angeles and used Exhibit 485 'Young Communists in Action,' which explained the relationship

of the YCL to the Communist Party, that the YCL was part of the Communist Party as a whole, that the YCL acknowledged the political leadership of the Communist Party and that the YCL was a school for Communism [Ex. 485; A. 594, 258]. In 1935 Dobbs attended a meeting of the State Committee of the YCL in San Francisco (A. 243, 244). In 1936 Dobbs attended underground meetings of the YCL in Los Angeles (A. 262, 264). In September, 1936, Dobbs as Benjamin Isgur, was appointed a member of the State Central Committee of the Communist Party [Ex. 549; A. 458]. In the latter part of 1936, Dobbs attended a meeting of YCL leaders in Los Angeles which was also attended by appellants Carlson and Steinberg (A. 247). In the year 1936, Dobbs was also active as a representative of the YCL in San Francisco and attended executive committee meetings of the waterfront section of the Communist Party in San Francisco [R. 1232-1233]. In the early part of 1937, Dobbs attended a meeting of the State Committee of the YCL at Communist headquarters in San Francisco. In June, 1938, Dobbs, as Benjamin Isgur, was a registered communist [Ex. 634; A. 456]. In September, 1938, Dobbs attended a State meeting of the YCL at Communist Party headquarters in San Francisco (A. 250).

"Exhibit 611, 'Two Decades of Progress' 1919-1939, published by the Communist Party of Los Angeles County, reflects on page 26 a salute of the YCL to the Communist Party and contains the photograph of Ben Dobbs, Executive Secretary of the YCL [Ex. 611; R. 5591-5593]. Before 1948, Dobbs attended at least fifty meetings at the California State Headquarters of the Party in San Francisco (A. 368).

"In the Fall of 1946, Dobbs attended a Communist Party meeting in Los Angeles, which was addressed by the appellant Schneiderman (A. 133-134). In November or December, 1946, Dobbs attended a Communist Party meeting in Los Angeles, which was addressed by appellant Oleta Yates (A. 135-136). In December, 1946, Dobbs was introduced to the witness Wereb as Labor Chairman of the Los Angeles County Communist Party at Communist Party Headquarters in Los Angeles. This witness subsequently heard Dobbs speak at Party fund raising rallies (A. 137). In December, 1946, Dobbs attended a conference of the Los Angeles County Communist Party in Los Angeles (A. 306-307). In May, 1947, Dobbs was County Labor Director of the Los Angeles County Communist Party and was Chairman of the Communist-sponsored May Day Rally, May 7, 1947 [Ex. 407; R. 3937-3939].

"In March, 1948, Dobbs lectured to a Communist Party Press School in Los Angeles and required the class to read pages 149 through 159 in the History of the Communist Party of the Soviet Union [Ex. 28], and compared the role of the Daily People's World in the United States with that of the Russian newspaper 'Pravda' in the revolution in Russia. Dobbs said that the *People's World* had a similar role in the United States and that it was necessary for the press directors responsible for the distribution of the People's World and of other literature to see that an organization was set up to provide for the distribution of Communist publications by underground methods when Communist publications were no longer allowed in the United States as had been done by Pravda in Russia [A. 193-196; R. 5014-5018]."

[*Approximately fifty issues of the People's World were introduced into evidence and many hundreds of others were available for such introduction. There was not one article in one issue that advocated directly or by inference the overthrow of the government by force and violence.*]

"In March, 1948, Dobbs attended a south side section functionary meeting of the Los Angeles County Communist Party where he was introduced as the Trade Union Director of the Los Angeles County Communist Party (A. 289-290). In March, 1948, Dobbs addressed a functionary meeting of the Los Angeles County Communist Party, also attended by appellants Healey and Carlson, in which he again referred to the History of the Communist Party of the Soviet Union and again compared the role of 'Pravda' with the role of the *People's World* in the United States and said that in addition the *People's World* must be maintained for the purpose of issuing instructions to party workers. (A. 186-192). In April, 1948, Dobbs was a registered Communist in Los Angeles County, California [Ex. 559; A. 452]. As Labor Secretary of the Los Angeles County Communist Party Dobbs made one of the major reports to the County Convention of the Los Angeles County Communist Party held July 10 and 11, 1948, and urged that the entire Party must develop its concentration work to change the composition of the Party and increase its working class base [Ex. FO, p. 3; R. 5152-5156].

"January 21, 1949, Dobbs as Labor Secretary of the Los Angeles County Communist Party made the main speech at a Lenin Memorial Meeting in Los Angeles, sponsored by the Los Angeles County Communist Party;

appellant Steinberg was Chairman of the meeting [Exs. 737, 159-B; A. 208-211].

"In September, 1949, Dobbs was Chairman of a Party meeting sponsored by the Los Angeles County Communist Party at which the appellant Healey, as Chairman of the Los Angeles County Communist Party spoke (A. 291-292).

"In December, 1949, Dobbs as Organizational Secretary of the Los Angeles County Communist Party spoke at the 32nd Anniversary Celebration of the Establishment of the Soviet Union, which event was sponsored by the Los Angeles County Communist Party (A. 108-109).

"In March, 1950, itness Scarletto was directed to the home of Ben Dobbs to ascertain the new location of the next class of the Marxist Institute. Dobbs was present when the witness was instructed to wait for a person who would take him to the new class (A. 96-97). In May, 1950, Dobbs as Los Angeles County Organizational Secretary of the Communist Party was a speaker at a functionary meeting of the Southern Division of the Los Angeles County Communist Party at which appellant Spector was introduced as Organizer of the Southern Division. Dobbs spoke on the Daily People's World fund and subscription drive (A. 292-294). In the summer of 1950, Dobbs spoke concerning the Daily People's World drive at an all day meeting of the Los Angeles County Communist Party (A. 98). In the Fall of 1950, witness Lancaster was informed that because he worked in a key industry he was being dropped from his club and further open activities in the Communist Party and that such ruling was also being applied to Ben Dobbs (A. 299-300).

The account of the Los Angeles County Communist Party in the Bank of America, Los Angeles Branch, reflects that Dobbs was an officer of the Los Angeles County Communist Party in April, 1951 [Ex. 642; A. 451].

"*Dorothy Healey Connelly.*

"In 1933 Dorothy Healey Connelly, commonly called 'Dorothy Healey,' was in the Los Angeles Office of the Young Communist League (A. 243) and in 1936 she attended underground meetings of the County Committee of the YCL in Los Angeles (A. 262-264). Early in 1945 Healey was the highest functioning party official available to settle a dispute in a Party Club (A. 124).

"Healey participated in major phases of the California State and Los Angeles County conventions of the Communist Political Association or of the Communist Party in June, July and August, 1945, when the Duclos article and the reconstitution of the Party were discussed. She also participated in the actual reconstitution of the Communist Party having attended the National Convention of the Communist Political Association in New York where the reconstitution of the Communist Party was accomplished. After this national convention Healey spoke at the second session of the California State Convention, Southern Section, and said that the future of the Party would be militant. She urged the re-education of all Marxists and the recruiting of new members in basic industries. Healey, in June, 1945, was observed at the State Headquarters of the Communist Party in San Francisco, where she visited many times between June and

December, 1945, and at least 20 times after December, 1945. At the June, 1945, session of the California Communist Political Association Convention, Healey was named on a subcommittee to examine the question of State leadership and submit its findings to the second session of the convention. At these convention sessions Healey was elected a member of the California State Committee of the Communist Party and about the same time she was elected Organizational Secretary of the Los Angeles County Communist Party [A. 44, 130-131, 124, 374-375, 124-125; Ex. 415].

"Healey, in August, 1946, addressed a Party meeting and urged that Trade Union leaders be Marxist trained and that all strikes in basic industries must be communist led and the Party leadership must be consulted on the progress of strikes (A. 133). In October, 1946, Healey's name appeared on the letterhead of the Communist Party as Organizational Secretary of the Los Angeles County Communist Party [Ex. 321]. In 1946 Healey was elected a member of the California State Committee of the Communist Party [A. 125; Ex. 398]. In February, 1947, Healey attended a Party meeting in Los Angeles and urged the necessity of recruiting new members among industrial workers in the basic industries (A. 305-306). In May, 1947, Healey addressed a Communist Party sponsored May Day Rally in Los Angeles as County Organizational Secretary of the Communist Party [Ex. 407]. In 1947 Healey spoke at a meeting attended by co-conspirator Henry Winston, Organizational Secretary of the National Committee, Communist Party of the United States of America (A. 31). In 1948, Healey attended

secret State Board meetings of the California State Communist Party at the home of witness Bessie Honig (A. 231). In March, 1948, Healey addressed a Los Angeles County Communist functionaries meeting and again urged recruiting new members in labor unions, particularly those in a position of leadership [A. 186-191; R. 4979-4989]. In the spring of 1948, at a Party meeting in Los Angeles called for the purpose of dividing a section, Healey was introduced as Los Angeles County Organizational Secretary of the Communist Party (A. 289-290). In the summer of 1948, she was, likewise, introduced at a meeting held in Los Angeles for the purpose of electing delegates to the State Conventions, Healey being one of the delegates elected (A. 291). Healey as Los Angeles County Organizational Secretary, delivered a major report at the Los Angeles County Convention of the Communist Party held July 10-11, 1948 [Ex. FO]. In the fall of 1948, Healey attended a Regional Convention of the Communist Party in Los Angeles (A. 92). In the summer of 1949, following a National Committee plenum in New York, Healey received a portable mimeograph machine designed for use in the Communist Underground (A. 64-68). In September, 1949, Healey addressed a Party meeting in Los Angeles where she was introduced as Chairman of the Los Angeles County Communist Party (A. 291-292). In January, 1950, Healey attended a Regional Meeting of the Communist Party in Los Angeles (A. 93-94). In the spring of 1950, Healey attended a *People's World* (see *supra*, p. 85) Circulation Drive Rally (A. 95-96). The evidence shows that Healey has occupied a position of responsibility in the

Los Angeles County Communist Party, either as Secretary or Chairman, from October, 1945, until April, 1951 [Exs. 641, 640, 645, 644, 643, 642].

"*Frank Carlson.*

"In 1935 Carlson was California State Director of the Young Communist League (A. 11, 246). In 1936 he attended underground meetings of the Los Angeles County Committee of the Young Communist League and instructed Young Communist League study groups in which he used Exhibit 266, *What Is to Be Done?* [Ex. 266], by V. I. Lenin, and said that in order to win the young people for the fight against fascism the Young Communist League would have to be dressed up and changed to make it look more like an American Organization; he discussed methods of doing this and said 'We must look to Lenin for the answers' (A. 244-245). At the Young Communist League Offices in 1936 Carlson led a discussion on how to build the Party youth press (A. 245-246). In 1936 or 1937, Carlson attended the National Convention of the Young Communist League in New York City [R. 6227]. In 1937 Carlson, a member of the State Committee of the Young Communist League, attended a State Committee meeting of the YCL at the Communist Party Headquarters in San Francisco (A. 246), and in September, 1938, he attended another State Board Meeting of the Young Communist League (A. 250).

"Carlson attended the State Convention of the Communist Party held in San Francisco in 1945 and from the end of 1945 through 1946 he had a desk in the California

State Headquarters of the Communist Party and attended State Board Meetings held in these headquarters where he also taught classes in Marxism (A. 358-365). In April, 1946, witness Hamlin was instructed by the San Diego County Communist Party organizer to contact Carlson at the headquarters of the Los Angeles County Communist Party when Hamlin went there on Party business [A. 30; R. 1346]. Later in the same year, Carlson met with the San Diego County Committee of the Communist Party in San Diego (A. 31). Appellant Yates testified that she, in collaboration with Carlson, prepared in 1946 a handbook for club officers in order to help them organize the work of their clubs [A. 388; Ex. MF].

[*For further details regarding this alleged incident see the section dealing with petitioner Yates, p.....,* *supra.*]

"By 1947 Carlson had been a member of the Communist Party for fourteen or fifteen years [R. 7421; Ex. FF; R. 4918; Ex. 730]. In April 1947, Carlson left San Francisco and became the State Secretary of the Communist Party in Wisconsin [A. 365, 280; Ex. 729] where he was introduced to a Communist meeting in Milwaukee as an organizer from the national committee of the Communist Party (A. 276). Carlson said he had been sent to Milwaukee to organize the Party and see that it became more militant (A. 277).

"In Milwaukee Carlson instructed the witness Estrada to buy the *Communist Manifesto* [Ex. 39], which he described as the bible of the Communist Party, *Problems of Leninism* [Ex. 146], *Foundations of Leninism* [Ex. 1], and the *History of the CPSU* [Ex. 28; A. 277-278; R.

6482-6484]. Carlson endeavored to have witness Estrada organize a chapter of the United Negro and Allied Veterans in Milwaukee, saying that such an organization would be necessary in the event of a revolution in the United States. Carlson stated that the Negroes in the North would have to be militant enough to guide the Negroes in the South and that the Party had ways of getting guns* [A. 277-278; Ex. 730]."

[*The witness' contemporaneous written report to the F.B.I., Exh. 730, purported to quote appellant in this reference as saying "Negroes in the South will have to be taught the communist way of living. (program which is now being carried on by the Communist Party, the C.I.O. and the American Federation of Labor) before they can receive fire arms in the event of revolutionary action by the fascists in that part of the country" (R. 7446; emphasis supplied).*]

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*"Q. Will you relate as nearly as you can the substance of what was said by Mr. Carlson to you while you were conversing with him? A. (Witness Estrada.) Well, after we had finished our dinner * * * then he went on to state that the Negroes, the Party had been helpful to the Negroes in the South. I asked him, 'In what way?' He says, well, the Negroes down there had received some pretty severe kicks and he related a case where 200 white men were chasing one Negro to lynch him, and they were met by 100 other Negroes armed, who represed their attack, the 200 white men's attack upon this one Negro. He said 'Therefore, you can see that the Party has been helpful to the Negro in the South.' I then asked him how did the people get guns, the Negro people down in the South get guns. He says, 'Well, the Party has methods of doing so.' Then he says, 'You know, I would like to have you organize a United Negro and Allied Veterans of America organization', he says, 'because it will be necessary in the event of a revolution in this country to overthrow this country by the Communist Party, that the Negro boys in the North will have to be militant enough to guide the Negro people in the South * * *' (A. 277-278.)

"In March, 1948, Carlson attended a functionaries meeting of the Los Angeles County Communist Party (A. 186). In October, 1949, he visited a session of the Marxist Institute where he was introduced as the 'County Organizer,' and where he listened to a session of the class (A. 84). Appellant Yates testified that during 1951 she held frequent meetings with Carlson in the Los Angeles headquarters of the Communist Party in conjunction with her duties as an official of the Party (A. 394-396).

"That Carlson was aware of the secret nature of the Communist Party is clear from his caution to witness Estrada not to inquire the names of people attending a meeting in 1947 (A. 279-280), and the fact that he was present during a four-hour interview of witness Scarletto concerning Scarletto's underground assignment in April, 1951 (A. 89-91, 104-105)."

Appendix D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U.S.C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government:

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U.S.C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U.S.C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. . . ."

18 U.S.C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be de-

prived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix E

It is the purpose of the attached charts to portray chronologically and graphically as to each petitioner every item of evidence connecting him with an office in the Party, Marxism-Leninism and advocacy of any kind, relating to revolutionary processes. Where content of a speech or article is not noted in the chart, it is either because the record does not reveal the content or it has no conceivable relationship to revolution. Revolution is not equated with force and violence. Every reference to revolution is listed, no matter how remote it may be from the concept of violence. It is each petitioner's contention that these charts reveal that the evidence is insufficient to establish his or her specific criminal intent or connection with the alleged conspiracy.

With respect to petitioner Yates, her own testimony construing Marxism-Leninism as not advocating violent overthrow of our government and setting forth her own adherence to the democratic processes is not included in the chart.

CARLSON		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1932—Became Member 1935—Calif. State Director and Member State Committee Y.C.L. 1937—Member State Comm. Y.C.L.	None	None	None	1936—Led study group using Lenin's works and said must look to Lenin for the answers and called for fight against fascism.	None.
1940-1944	None	"	"	"	None	"
1945	"	"	"	"	"	"
1946	"	"	"	"	Taught classes in Marxism (What said not in record)	"
1947	Organizer and State (Wis.) Sec'y	Said Party had methods of getting guns to Negroes who used them in self-defense against lynching attack; in event of rev. "to overthrow this country" Negroes in North will have to be militant enough to guide Negroes in South. (The actual statement as shown by contemporaneous FBI report referred to resistance to "revolutionary action by fascists" and witness explained he considered this similar to overthrow of U.S. govt.)	"	"	None	"
1948	None	None	"	"	"	"
1949	County Organizer	"	"	"	Visited Marxist Institute (What said not in record)	"
1950	None	"	"	"	None	"
1951	"	"	"	"	"	"

DOROTHY HEALEY CONNELLY		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1933—Member Y.C.L.	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	County Org. Sec'y	"	"	"	Urged "militant" future for the Party and re-education of all Marxists.	"
1946	County Org. Sec'y	"	"	"	None	"
1947	County Org. Sec'y	"	"	"	"	"
1948	County Org. Sec'y	"	"	"	"	"
1949	County Chairman	"	"	"	"	"
1950	None	"	"	"	"	"
1951	County Chairman	"	"	"	"	"

DOBBS

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1932-1945—Member Y.C.L. 1935—City Director Y.C.L. 1936—Member State Committee	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	City Labor Chairman, Sec'y and Director	"	"	"	"	"
1947	City Labor Chairman, Sec'y and Director	"	"	"	"	"
1948	City Labor Chairman, Sec'y and Director	"	"	"	At two meetings referred to Ex. 28, History of CPSU and compared revolutionary role of Pravda in Russian rev. with role of People's World.	"
1949	City Labor Chairman, Sec'y and Director	"	"	"	Spoke at Lenin Memorial meeting. Record silent on what said.	"
1950	County Org. Sec'y	"	"	"	None	"
1951	Undesignated County Officer	"	"	"	"	"

FOX

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
		(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Oth Than Utterances and Perso Use of Books
Pre-1940	1935—City Organizer	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	"	Said Party "revolutionary" and "wanted to see overthrow of lousy system" but time for militant action not yet arrived.	"	"	"	"
1947	Club Chairman	None	"	"	"	"
1948	Club Chairman and City Section Chairman	"	"	"	Maintained complete Little Lenin Library at his home.	"
1949	City Section Organizer	"	"	"	None	"
1950	None	"	"	"	"	"
1951	City Section Organizer	"	"	"	"	"

KUSNITZ

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	None	None	None	None	None	None
1940-1944	1943—City Section Organizer	"	"	"	"	"
1945	None	"	"	"	"	"
1946	"	"	"	"	"	Present at meeting when Pet. Schneiderman urged immediate Marxist training and said free elections here can only serve purposes of fascists.
1947	"	"	"	"	"	None
1948	"	"	"	"	"	"
1949	City Section Organizer and City Division Org. Sec'y	"	"	"	"	"
1950	None	"	"	"	"	"
1951	"	"	"	"	"	"

LAMBERT

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1935—Member responsible for security; member Central Committee	None	None	None	None	None
1940-1944	1942—District Financial Sec'y 1944—City Admin. Sec'y	"	"	"	"	"
1945	None	"	"	Mother Bloor, 83-yr. old woman, predicted violent revolution with blood flowing in streets and praised UN, Roosevelt and peace.	"	"
1946	Head State Security Committee	"	Petitioner Fox said Party "revolutionary", "Wanted to see overthrow of lousy system" but time for militant action not arrived yet.	None	"	"
1947	None	"	Pet. Schneiderman said change to socialism would be violent because Masters of Finance Capital would not permit majority to change peacefully.	None	"	"
1948	"	"	None	"	"	Present at meeting when Pet. Dobbs said People's World had a role similar to that of Pravda and referred to History of C.P.S.U. (Ex. 28).
1949	State Financial Sec'y and Chairman State Security Board	"	"	"	"	None
1950	None	"	Question asked by FBI agent, who then being expelled whether revolution by bullets instead of ballots being planned and one, Alexander, replied "Just what the hell do you think we are purging the party for.	"	"	"
1951	"	"	None	"	"	"

LIMA		EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
Dates	(1) Position in Party	(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M.-L. Other Than Utterances and Personal Use of Books
Pre-1940	None	None	None	None	None	"
1940-1944	1940—Member	"	"	"	"	"
1945	City Field Organizer Member of National Committee	"	"	"	"	"
1946	None	"	"	"	"	"
1947	State Sec'y and Org. Sec'y	"	Pet. Schneiderman said change to socialism would be violent because masters of finance capital would not permit majority to change peacefully.	"	"	"
1948	None	"	None	"	"	"
1949	"	"	"	"	"	"
1950	County Regional Chairman	"	"	"	"	"
1951	None	"	"	"	"	"

SPECTOR

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION (2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	EVIDENCE RE MARXISM-LENINISM (5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1939—Then "pioneer leader" of Party 1936-40—County organizer, sec'y or chairman	None	None	None	None	None
1940-1944	None	"	"	"	"	"
1945	"	"	"	"	"	"
1946	"	"	"	"	Conducted classes and assigned reading material.	"
1947	"	"	"	"	Made criticism because of inadequate reading.	"
1948	"	"	"	"	None	"
1949	"	"	"	"	Announced as instructor on "The State"	"
1950	County Division Organizer	"	"	"	None	"
1951	None	"	"	"	"	"

STACK

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
		(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1932—Member	1934—Said that in Lenin School in Moscow learned street-fighting, etc., and duty to work to overthrow gov't and set up dictatorship of proletariat.	None	None	None	None
1940-1944	None	None	"	"	"	"
1945	Delegate to Natl Convention Member Calif. State Committee State Sec'y or Org. Sec'y	"	"	"	Urged Marxist-Leninist rules. Said American workers will be grave diggers of capitalistic government.	"
1946	State Sec'y or Org. Sec'y	"	"	"	None	"
1947	State Sec'y or Org. Sec'y	"	"	"	"	"
1948	State Sec'y or Org. Sec'y	Women should support revolution, the overthrowing of present economic system in its entirety.	"	"	Urged Marxist Party, based on proletariat and Marxist principles.	"
1949	State Sec'y or Org. Sec'y	None	"	"	None	"
1950	Member Calif. State Committee	"	"	"	"	"
1951	None	"	"	"	"	"

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	3
Statement	3
Summary of argument	41
Argument	46
1. The sufficiency of the evidence	47
2. The sufficiency of the overt acts	50
3. Schneiderman's *res judicata* contention	51
4. The charge	52
5. The finding of "clear and present danger"	60
6. The meaning of "organize" as used in the Smith Act	64
7. The denial of motions for continuance and mistrial	68
Conclusion	72

CITATIONS

Cases:

Braverman v. *United States*, 317 U. S. 49 ..... 42, 51
Carolene Products Co. v. *United States*, 323 U. S. 18 66
Cramer v. *United States*, 325 U. S. 1 71
Delaney v. *United States*, 199 F. 2d 107 71
Dennis v. *United States*, 341 U. S. 494 ..... 2, 3, 43, 44, 46, 48, 53–54, 58, 60, 61, 62, 64
Finnegan v. *United States*, 204 F. 2d 105 ..... 46, 71
Frankfeld v. *United States*, 198 F. 2d 679, certiorari denied, 344 U. S. 922 53
Fujimoto v. *United States*, No. 13951, pending on appeal to the Ninth Circuit 57
Gitlow v. *New York*, 268 U. S. 652 ..... 45, 66, 67
Holt v. *United States*, 218 U. S. 245 ..... 46, 71

357815—55——1

STEINBERG

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
		(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1936—Member YCL	None	None	None	None	None
1940-1944	1940—Member, "practical politician"	"	"	"	"	"
1945	None	"	"	"	"	"
1946	County Educational Director	"	"	"	"	"
1947	County Educational Director	"	"	"	"	"
1948	None	"	"	"	"	"
1949	"	"	"	"	Chaired public meeting and announced it as a "Lenin Memorial Meeting"	"
1950	County Legislative Director	"	"	"	None	"
1951	None	"	"	"	"	

Cases—Continued

	Page
Huff v. *United States*, No. 14320, pending on appeal to the Ninth Circuit	57
James v. *Appel*, 192 U. S. 129	66
Joines v. *Patterson*, 274 U. S. 544	66
Rex v. *Buck*, [1932] 3 D. L. R. 97	12
Sealfon v. *United States*, 332 U. S. 575	42, 52
Schneiderman v. *United States*, 320 U. S. 118	2, 42, 51, 52
Shushan, et al. v. *United States*, 117 F. 2d 110, certiorari denied, 313 U. S. 574	71
Stephan v. *United States*, 133 F. 2d 87, certiorari denied, 318 U. S. 781	71
United States v. *Dennis*, 183 F. 2d 201	71
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U. S. 909	44, 46, 53, 63, 71
United States v. *Katz*, 173 F. 2d 116	71
United States v. *Lebron*, 222 F. 2d 531, pending on petition for certiorari, No. 139 Misc	50
United States v. *Moran*, 194 F. 2d 623, certiorari denied, 343 U. S. 965	71
United States v. *Thompson*, 214 F. 2d 545, certiorari denied, 348 U. S. 841	24
Willis v. *Eastern Trust and Banking Co.*, 169 U. S. 295	66
Statutes:	
Internal Security Act of 1950, Sec. 4 (f), 50 U. S. C. 783 (f)	59
18 U. S. C. (1948 ed.) 371	59
18 U. S. C. (1948 ed.) 2385	59
Smith Act, Title I of the Alien Registration Act of 1940, 54 Stat. 671	67
New York Penal Law, Section 161 (4)	67
Miscellaneous:	
84 Cong. Rec. 10451–10452	67
85 Cong. Rec. 9032	67
Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 74th Congress, 1st Session, on H. R. 4313, May 22, 1935, Serial 5, p. 6	67
Webster's New International Dictionary (2d Ed.)	68

In the Supreme Court of the United States

OCTOBER TERM, 1955

Nos. 308, 309, 310

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY AND FRANK CARLSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The written opinions of the District Court (Pet. App. B) are reported in 102 F. Supp. 87, 104 F. Supp. 405, 106 F. Supp. 737, 892 and 906. The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

YATES

Dates	(1) Position in Party	EVIDENCE RE STATEMENTS CONCERNING REVOLUTION			EVIDENCE RE MARXISM-LENINISM	
		(2) By Petitioner	(3) Presence When Others Spoke—Closed Meetings	(4) Presence When Others Spoke—Public or Open Meetings	(5) Utterances and Personal Use of Books by Petitioner	(6) Connection With M-L Other Than Utterances and Personal Use of Books
Pre-1940	1933—Member 1936—County Organizer, District Comm. Member, Natl. Conv. Delegate 1937-40—Various County Officers	None	None	None	1936-37—Used books while lectured at school.	None
1940-1944	1940-43—Various County Offices 1944—County Chairman	"	"	"	None	"
1945	County Chairman	"	"	Mother Bloor, 83-yr. old woman, predicted violent rev. with blood flowing in streets and praised UN, FDR and peace.	Taught a Marxist class.	"
1946	County Chairman	"	Petitioner Fox said CP "revolutionary", "Wanted to see overthrow of lousy system" but time for militant action not arrived yet.	None	Contributed an article to Political Affairs.	"
1947	County Chairman	"	Petitioner Schneiderman said change to socialism would be violent because masters of finance capital would not permit majority to change peacefully.	"	None	"
1948	County Chairman	"	None	"	"	"
1949	County Chairman	"	"	"	Prepared a study outline for a Marxist Institute—stating opposition to force and violence.	"
1950	State Organizational Chairman	"	"	"	None	"
1951	State Organizational Chairman	"	"	"	"	"

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1955 (Pet. App. 46).[1] A petition for rehearing was denied on June 15, 1955. On June 27, 1955, Mr. Justice Frankfurter extended the time for filing petitions for writs of certiorari to August 13, 1955, and the petitions were filed on August 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the convictions.

2. Whether the overt acts alleged and proved were in furtherance of the conspiracy.

3. Whether, as to petitioner Schneiderman, this Court's decision in *Schneiderman* v. *United States,* 320 U. S. 118, required application of principles of *res judicata* and collateral estoppel.

4. Whether the charge to the jury properly applied the principles of *Dennis* v. *United States,* 341 U. S. 494.

5. Whether there was a sufficient finding of "clear and present danger."

6. Whether the trial judge properly instructed the jury as to the meaning of "organize" as used in the Smith Act.

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[1] References to Petitioners' Appendix are abbreviated "Pet. App."

7. Whether the trial judge erred in denying petitioners' motions for a continuance and a mistrial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth in Petitioners' Appendix (App. D).

STATEMENT

THE PROCEEDINGS BELOW

On December 21, 1951, petitioners were indicted (Clerk's Record, p. 2; see also 106 F. Supp. at 930–932) in the United States District Court for the Southern District of California for conspiring with each other and with the *Dennis*[2] conspirators "to commit offenses against the United States prohibited by Section 2 of the Smith Act * * * in violation of" Section 3 of the Smith Act until repealed by the 1948 revision, and thereafter in violation of the general conspiracy statute, 18 U. S. C. 371, by (1) knowingly and willfully advocating violent overthrow of the Government, with the intent of causing such violent overthrow as speedily as circumstances would permit; and (2) with the same knowledge and intent, organizing and helping to organize the Communist Party to so advocate.

Paragraphs 2–8 of the indictment charge that it was part of the conspiracy, *inter alia*, that the petitioners and their co-conspirators would be-

[2] *Dennis* v. *United States*, 341 U. S. 494.

come members, officers, and functionaries of the Party and thereby assume leadership and responsibility for carrying out its policies and activities (par. 2); that they would organize groups, clubs, sections and other units of the Party and would recruit members, concentrating on recruiting persons in key industries and plants (par. 3); that they would publish and circulate books and newspapers, such as the *People's World,* and would write articles and publish directives therein (pars. 4 and 5); that they would conduct and cause to be conducted schools and classes in which recruits and Party members would be indoctrinated in the Marxist-Leninist principles of violent revolution (par. 6); that vital parts of the Party would go underground and continue the conspiracy from that position; and that false names and documents would be used (pars. 7 and 8).

The indictment then alleged overt acts in furtherance of the conspiracy.

After disposition of the pre-trial motions, the jury was impaneled on February 1, 1952. One defendant (Mary Bernadette Doyle) was severed because of illness. The Government presented its case through the testimony of twenty-one witnesses, who had been either former *bona fide* members of the Communist Party or had joined the Party at the instigation of the Federal Bureau of Investigation, and through the intro-

duction of books, articles, etc., which set forth the policies and program of the Party, and paralleled the proof in the *Dennis* case. All but four of the defendants (Schneiderman, Yates, Stack and Carlson) rested their case without putting in any evidence. Except for the brief testimony of two witnesses and a deposition, the defense consisted of the testimony of Yates concerning her understanding of the Communist Party program. The jury deliberated for six days and, on August 5, 1952, returned a verdict of guilty as to all defendants. On August 7, 1952, the court entered the judgments of conviction.

The judgments were affirmed by the Court of Appeals on March 17, 1955 (Pet. App. 46).

THE GOVERNMENT'S EVIDENCE

The dominant role of the petitioners in organizing and directing the Communist Party in California is illustrated in the following summary of their functioning in the Communist Party apparatus:

> WILLIAM SCHNEIDERMAN—Active since 1922; Organizational Secretary of the California District in 1930; also in 1930, District Organizer in Connecticut; 1931 to 1934, Organizer, Minnesota District. In 1934, American Party representative to Communist International (C. I.) and lecturer at the Lenin Institute in Moscow; attended Seventh World Congress of the

Communist International (A. 333–340;[1] Ex. MM–1 p. 95); District Organizer or Chairman of California Party, 1935 until 1951 and member of District Board or Committee (A. 2, 446, 459; Tr. 301); attended National Party conventions in 1925, 1930, 1932, 1934, 1936, 1938, 1940, 1945, 1948; member of National Committee, 1934 to 1939, 1940, 1944, 1945 to 1948, and alternate member in 1950 (Exs. MM–1 pp. 91–98; A. 44, 57, 115–116, 132, 404, 598, 605; Tr. 301); attended various meetings of the National Committee since 1939 (Tr. 5449–5501); attended the California conventions since 1945 (A. 14–16, 112–113, 127–129, 145–147, 580–581).

OLETA O'CONNOR YATES—Active since 1933 (Tr. 455, 10250); since 1936 Organizer or Chairman of the San Francisco County Party and a member of the California District Committee or Board (A. 6, 8, 126–127, 147, 378, 418; Tr. 455, 458, 3842, 5456); attended secret District Board or Committee meetings from 1944 until 1949 (A. 223–241; 358–361; Tr. 7771–7780); alternate member of National Committee in 1944 (A. 132); attended at least three National Conventions, including those in 1936 and 1944 (A. 8, 429); attended California Party

[1] Excerpts from the reporter's transcript and from the exhibits in evidence were printed in two volumes as an appendix to the Government's brief in the Court of Appeals. References to pages of this appendix are referred to as, for example, "A. 128." References to the reporter's typewritten transcript of the trial are referred to as "Tr."

conventions since 1945 (A. 14–16; 403–404; Tr. 616–621); State Organizational Secretary since 1950 (A. 393–394).

HENRY STEINBERG—As early as 1936 was attending Young Communist League (YCL) meetings in Los Angeles; in 1940 and 1942 was functioning on the Los Angeles County Committee; it was a function of this committee to receive a report on all phases of the Party teaching in Party schools (A. 256–258); at such a 1940 committee meeting he participated (along with Philip Connelly) in a discussion of means for implementing the Party policy of "Don't support the imperialist war"[4] (A. 247–248, 256–260); in 1946 or 1947 was Educational Director of Los Angeles County (A. 138–139); in 1950 was Legislative Director of Los Angeles County (A. 455).

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[4] Up to 1941, during the period of the Soviet pact with Hitler, the war was characterized by the Party as one for imperialist objectives and therefore an unjust war (A. 275, 572, 592, 594, 602; Tr. 8652). The characterization of the war in this period as unjust, which could not be supported, was not an idle statement by the Party. The fundamental Marxist-Leninist strategy of the Party in a period of "unjust" war has been repeatedly cited by the Party (See Exs. 93, 213, 450, 613, 626) from the *History of the C. P. S. U.* (Ex. 28, pp. 167–168; A. 495). In respect to unjust wars, the *History* states that the program of "converting the imperialist war into a civil war" and "the defeat of one's own government in the imperialist war" were put forth as slogans of action (*ibid.*, p. 167).

When the Soviet Union was invaded by Germany in June 1941, the "character" of the war changed; the war became a "just" war and the Party called on all countries to unite to destroy Fascism (A. 255–256, 274–275).

LORETTA STARVUS STACK—In 1932 attended the Lenin Institute in Moscow;[5] in 1934, member of District Committee of YCL in Philadelphia (A. 213–223; Tr. 5354–5387, 5760–5761); attended 1945 National Convention (A. 72–73); attended various National Committee Plenums (A. 72); attended 1946 and 1948 California Conventions (A. 29–30, 580); from 1945 to 1950 was Secretary or Organizational Secretary of the California Party, and as such had an office at Party headquarters (A. 238, 364–365, 446–452; Ex. 315); from 1947 to 1949, attended secret meetings of the District Board or Committee (A. 223–231); and at least in 1945 and in 1950 was a member of the California District Committee (A. 124–125, 130, 418; Ex. 398). Yates testified that in connection with Party duties she had been in contact with Stack quite often in the five years preceding 1952 (A. 396).

FRANK SPECTOR—Was a "pioneer leader of the Communist Party in Los Angeles" (Ex. 611); was in Moscow in 1934 (A. 332); in 1935 was sent from New York to be San Francisco County Organizer or Secretary and also attended YCL State Committee meetings (A. 5–6, 12, 243–244); in 1937 was San Francisco County Organizer

[5] Stack received instructions at the Lenin school concerning the use of automobiles, streetcars and buses as barricades to protect the revolutionists in their fighting, in the use of bayonets, and in the duty to set up an illegal, underground Party apparatus (A. 216–217).

and from 1937 to 1940 was attending California District meetings (A. 6, 9, 12); in 1946 was a Los Angeles Party teacher; in 1949 was designated as an instructor at a Party school (A. 297, 307–310); in 1947 was in charge of expulsion proceedings against a Party member (A. 310–312); in 1950 was Southern Division Organizer of Los Angeles County (A. 292–294).

'AL RICHMOND—In 1931 was Organizational Secretary of the YCL in Philadelphia; in 1932 was on the Editorial Board of the *Daily Worker* and was assigned to the Waterfront Fraction of the Party (A. 211–213); in 1937 was made Editor of the *People's World* by the Party's National Committee (A. 10; Ex. 636) and remained as such until 1952 (Tr. 11324); in 1946, as editor, he stressed the necessity for the Marxist-Leninist approach in every issue of the paper (Tr. 3953–3954); and in 1948 addressed the State Convention concerning the necessity for the State Board reviewing the *People's World's* content and line and for the further integration of the staff of the paper in the Party Committees (A. 580–581; Ex. 186); between 1946 and 1949 attended secret sessions of the California State Board or Committee (A. 223–231, 368); was designated by the State Committee as a member of the 1950 pre-convention committee (Ex. 181 p. 1); in 1950 and 1951 was addressing Party conventions as a representative of the State Committee

and as Editor of the *People's World* (A. 110–113).

ALBERT JASON LIMA—Was an active Communist at least since 1940 (A. 452–458); in 1944 member of District Committee (Tr. 3842); attended 1945 National Convention (Tr. 2037); from 1945 until at least 1948 had offices in State headquarters and was California State Field Organizer (A. 12, 362–364; Ex. 315); from 1945 to 1948 was a member of the National Committee (A. 598; Ex. EA); from 1947 to 1949 attended secret meetings of the State Board (A. 223–231); in 1947 was also Assistant State Organizational Secretary (Ex. EA); and in 1949 was Secretary of the California Party (A. 447); attended the 1950 West Oakland Convention of the Party; delegate to the 1950 State Convention; in 1951 was in charge of proceedings at the East Bay Convention; in 1950 and 1951 was Chairman of the East Bay Region (A. 109–114; Tr. 3574–3575).

CARL RUDE LAMBERT—From 1935 until at least 1950 was head of the Party Control and Security Commission and was in charge of Party security matters and the discipline and expulsion of Party members (A. 12, 27–28, 148–153, 235–236, 249–250, 327–329; Tr. 7617, 7620); in 1936 was attending underground meetings of the Los Angeles YCL (A. 262–264); from 1939 to 1949 was Assistant Treasurer and Treasurer for the California Party (A. 446–449), and as such maintained an office at

State headquarters during at least 1944 and 1945 (A. 364); attended the 1945 California State Convention (A. 14); from 1945 to 1949 attended secret State Board meetings of the Communist Party (A. 223–231, 359).

Rose Chernin Kusnitz—In 1943 was Section Organizer of the Bronx Section in New York (A. 317); in 1945 attended the New York State Convention (A. 45); in 1946 was in Los Angeles attending Party meetings which were concerned with the immediate starting of Marxist training (A. 133–135) and where it was stated that Marxism could succeed only through the support of the Soviet Union (A. 135–136); in 1948 and 1949, functioned as Section Organizational Secretary of the 66th Assembly District Section and as Organizer of the West Jefferson Section of Los Angeles County and as such wrote for the Party's 1948 convention bulletin concerning her section's activities in conducting a leadership training course and in recruiting new members (A. 356, 581–582); from 1949 functioned as Organizational Secretary of the Midtown Division (A. 356–357).

Ernest Otto Fox—As early as 1935 was the Party's Seattle Organizer (A. 10); before 1948 and up to 1949 regularly attended secret State Board or Committee meetings (A. 223–231, 366–368); in 1947 and 1948 was Chairman of the Warehouse Branch (A. 283; Tr. 4394–4395); in 1948 stated that he had attended a secret National

Party School and had been a delegate to a New York Party convention (A. 286; Tr. 6598–6603); in 1948 was Chairman of the Haskell Section (A. 283–284); from 1949 to 1951 was Organizer of the Waterfront or Maritime Section in San Francisco (A. 288, 579; Tr. 2832).

BEN DOBBS—Member of YCL since 1932; from 1935 to 1939 attended State Committee and underground meetings and occupied executive positions in YCL (A. 11, 243–244, 247, 250, 258, 262, 264, 595; Tr. 6136–6137); in 1936 was attending Party Executive Committee meetings (Tr. 1232–1233); before 1948 regularly attended secret State Board or Committee meetings (A. 368, 376); in 1948 lectured at a Party school (A. 193–196; Tr. 5014–5018); and was connected with the 1950 Marxist Institute (A. 96–97); from 1946 to 1949 was the Party's Labor Secretary for Los Angeles County (A. 137, 208–211, 289–290; Exs. FO p. 3, 159B, 407, 737; Tr. 3937–3939, 5152–5156); from 1949 to at least 1950 was Los Angeles County Organizational Secretary (A. 108–109, 292–294); was still a Los Angeles County Party officer in 1951 (A. 451).

PHILIP CONNELLY—As early as 1938 was participating in Party caucuses in Toronto with the head of the Canadian Communist Party[6] (A. 344–346); in 1940 and 1941 had functioned on the Los Angeles County Committee (A. 247–254); in 1941 at such a committee meeting he discussed ways of organ-

[6] See *Rex* v. *Buck* (1932) 3 D. L. R. 97.

izing the workers in steel, aircraft and shipyards to build up sentiment against the country's war effort in furtherance of the Party's mobilization to brand World War II as an imperialistic war and to defend the Soviet Union (A. 251–252); as implementation of the foregoing, mobilized support for a strike at the North American Aviation Company where the Government had threatened to bring in troops to settle the strike (A. 252–253); was attending secret State Board or Committee meetings at least between 1945 and 1948 (A. 372–374; Tr. 7825–7830); in 1947 and 1950 was connected with Los Angeles County Party clubs, and in 1947 participated in a meeting devoted to the Communist Party going underground (A. 295, 329–332); from at least 1949 was Los Angeles Editor of the *People's World* (A. 204–205, 294–295, 406; Ex. 736).

DOROTHY HEALEY CONNELLY[1]—As early as 1933 was in the YCL and in 1936 was attending Los Angeles County YCL underground meetings (A. 243, 262–264); attended the 1945 National Convention and 1945 California Conventions; in 1945 and 1946 was a member of the California State Committee and Organizational Secretary of the Los Angeles County Party (A. 44, 124–125, 130–131, 374–375; Exs. 321, 398, 415); after 1945 was often at State Headquarters, and in 1945 and 1948 attended

[1] She was generally known in the Communist Party as Dorothy Healey, and most of the references to her in the evidence are under that name.

secret State Board meetings (A. 231, 375); in 1948 attended various Los Angeles Party Conventions and was a delegate to the State Convention (A. 92, 291; Ex. FO); in 1949 was at National Headquarters at a National Committee plenum and also in connection with underground operations (A. 64–68); continued as Organizational Secretary until 1949 (Ex. FO, 407; A. 289–290); 1949 to 1951 was Chairman of the Los Angeles County Party (A. 291–292, 450–451).

FRANK CARLSON—Was active in YCL 1935 to 1938; was its California Director in 1935 and on its State Committee in 1937; attended its underground meetings, its National Convention and its State Board meetings (A. 11, 244–246, 250; Tr. 6227); attended 1945 California convention (A. 14); in 1946 attended secret State Board meetings of the Party (A. 357–361), at which time he had an office at State headquarters (A. 358–365); in 1946 was contact man for the San Diego Party (A. 30–31; Tr. 1346); in 1947 was sent by the National Committee as Organizer in Wisconsin (A. 276–277, 280, 365; Ex. 729); in 1948 was a Los Angeles County functionary (A. 186); in 1949 was Los Angeles County Organizer (A. 84); and in 1951 was meeting with Yates at Los Angeles headquarters on Party business (A. 394–396).

Yates testified that the California Party functioned under the leadership of the State Committee (A. 393). She further testified that in

1951 the California Party had six or seven thousand members (A. 409). Attending secret California State Board or Committee meetings from 1944 to 1949 were Schneiderman, Lambert, Yates, Fox, Richmond, Healey, Dobbs, Carlson, Connelly, Stack and Lima (A. 224–233, 356–376, 415–416; Tr. 7825–7830). Yates refused to answer as to which of her fellow defendants, other than Schneiderman, Stack and herself, were members of the California State Committee in 1950 (A. 418–419). Schneiderman, Yates, Stack, Lima, Lambert and Richmond have worked partially or exclusively on the state or district level. Stack, Lima, Schneiderman, Yates, Richmond, Lambert, Lima and Fox were operating together in their capacities as the controlling Communist Party officials in the San Francisco area (A. 106–115, 145–146, 149–153, 235–237, 284, 369–372). Healey, Dobbs, Carlson, Lambert, Spector, Connelly, Stack, Steinberg, Schneiderman, Yates and Kusnitz similarly were operating together as the controlling Party officials in Los Angeles [8] (A. 84, 92–99, 127–131, 133–138, 140–142, 186–192, 203–207, 289–293, 295, 305–307, 315–316, 329–332, 356–357, 446–459). Steinberg, Healey, Schneiderman, Richmond, Stack and Lambert were also operating in San Diego (A. 29–31, 35). Carlson was the San Diego Party contact in Los Angeles (A. 31).

[8] Carlson, Spector, Richmond, Steinberg and Healey were also working together in the California apparatus of the YCL as early as the '30's (A. 262–263).

Petitioners Schneiderman, Yates and Lima have been on the National Committee, and a number of petitioners have attended national conventions and national committee meetings with the *Dennis* defendants (A. 7, 44–52, 66–68, 72, 115–116, 131–132, 404–405, 598; Ex. MM–1).

The extent of the central control over the California Party organization is seen in the admissions of petitioner Yates. Her duties as State organizational secretary functioning under the State Committee included organizing recruiting drives in order to build the Communist Party into a bigger organization; checking on the payment of dues; giving "help" to the various subdivisions of the Communist Party, that is, the county and club groups; preparation (with Schneiderman) of study outlines used in Party schools; and contacting other leaders of the Communist Party. While Yates admitted that the latter included regular communication with Schneiderman, Stack, Carlson and the Los Angeles Party leaders, she refused to name the other defendants with whom she worked in connection with her Party duties (A. 393–396, 403; see also A. 30, 290, 388).

Control of Party operations by the conspirators was exercised by means of the Party principle of democratic centralism. Petitioner Yates stated that "democratic centralism, as I understand it, is the basic principle upon which the Communist Party organization is founded" (A. 388; see also Ex. 161). It was derived from the Communist

Party of the Soviet Union, which insisted upon the "strictest and truly iron discipline" (Ex. 1 p. 118) and required: "That all decisions of higher bodies shall be absolutely binding on lower bodies and on all Party members." (Ex. 28 p. 198). This meant in the California Party that the local units were controlled by the county leadership, who in turn were governed by the state leadership and the national leadership (A. 9, 17, 26, 32–33, 36, 173, 196–197, 256–257, 320, 403; Ex. 161 p. 2, Ex. MF).

Iron control was maintained by frequent purging[9] of members who failed to follow the Party line orders of the conspirators (A. 28–29, 53–55, 71, 157–158, 201–202, 235–237, 310–313, 322, 328, 586–587; Ex. 153 pp. 19–20). At the direction of the National Board, a San Francisco "Left-Sectarian" group was expelled[10] for "anti-Party

[9] A glimpse of the Party's purpose is seen in Lambert's statement that they were "purging the Party['s] membership for emergency or revolution" (A. 328).

[10] At a Party meeting attended by Yates, Lambert and Lima, Schneiderman reviewed the San Francisco expulsions of the Left-Sectarians, stating that "they were like the horse that was too far ahead of the cart, and the party did stand for revolution, he wanted to assure the members of that"; that "they were on a purely Marxist-Leninist line"; that "he doubted if most of the members realized the seriousness of revolution and that revolution meant bloodshed and tragedy and the loss of lives and property, and that these things were expendable in the long run in the fight for socialism" (A. 146–147, 172–173).

activity" consisting of failure to follow Party orders in an ILWU strike; and Yates warned against further association with these expelled people. When a *People's World* staff member defended them as sound Party members and good trade unionists, he was expelled (Ex. 639 p. 1103; A. 151–153, 157–158). Subsequently, one Rosenbaum was also expelled, with Yates and Fox participating, for the offense of associating with the expellees.[11] Like a row of dominoes, another Party member, in turn, was admonished by his club chairman for associating with Rosenbaum and was told that he would have to make his choice, either with the Party or against it; that the Party would choose his friends and the persons with whom he associated (A. 147–150, 158–159).

Another manifestation of the working of the principle of democratic centralism occurred when petitioners and other Party functionaries went to distant parts of the country or to various parts of the California district to carry out their Party

[11] Fox reprimanded Rosenbaum for claiming that the Party was still influenced by the Browder policies, and declared that the Party was a revolutionary party but that it "was not going to stick its neck out" and get its "head chopped off." Fox further stated that he "wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not arrived yet" (A. 150).

duties on orders of their superiors [12] (A. 2–3, 10, 12, 26, 31–32, 42, 186, 276, 285, 341; Tr. 2060; Ex. 636).

In adherence to the requirement of the Communist International that "all organs of the press belonging to the Party must be edited by reliable Communists who have proved their loyalty to the cause of the proletarian revolution" (A. 566), the Central (National) Committee, in 1937, selected Richmond to be managing editor of the *People's World* (Ex. 636; A. 10); Connelly in recent years has been its Los Angeles Editor (A. 406). The position of editor has always been a full-time position in the Party, and lesser offices are likewise Party positions (A. 107, 112–113, 284, 294–295, 341, 570, 580–581; Ex. MF p. 15; Tr. 3833).

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[12] See Ex. 61 p. 112 (A. 516): "A professional revolutionist is a highly developed comrade, trained in revolutionary theory and practice, tested in struggles, who gives his whole life to the fight for the interests of his own class. A professional revolutionist is ready to go whenever and wherever the Party sends him. * * * If the class struggle demands it, he will leave his family for months, even years."

Compare Steve Nelson's praise of Schneiderman as a person who had given his whole life to the Party and who fitted Lenin's definition of a professional revolutionist (A. 15).

Stack, in speaking of her role in the Party in relation to her family, said that the Party should occupy the highest place and should take precedence over family life, which was second to the Party's program. She compared the role played by women in bringing about the Russian revolution, stating that women "should take up arms side by side with men." (A. 106–107, 118–119.)

The Party, following the experience of the Russian Party, regards its newspapers as necessary for achieving the proletarian revolution. The Tenth Convention of the American Communist Party in 1938 described the *People's World* and other Party newspapers "as the indispensable instrument for realizing the present objectives and historic aims of the working class movement." (Ex. J p. 17; Tr. 1248.) It is a Marxist-Leninist tenet that "preparation for the dictatorship of the proletariat will be impossible" without a "Communist press that will enlist all the masses" (A. 566). In 1948, Dobbs twice described the function of the *People's World* by comparison with the role that the outlawed *Pravda* had played in Russia where it was used to disseminate information and issue instructions to members of the underground revolutionary movement, stating that the *People's World* performed a similar function over here. Dobbs referred the members to the *History of the CPSU* which states that "the Party trained a new generation of revolutionary workers—the Pravdists" who "subsequently formed the core of the Bolshevik Party during the Revolution of October 1917" (A. 191, 194; Ex. 28 p. 159).

The *People's World* editors regularly were present at the secret State Board or Committee meetings; when the District Board or Committee arrived at any decision on political or organizational matters, an editorial or some pertinent

article about that particular subject would automatically follow in the next issue of the paper. According to Richmond, each issue of the paper was required to have the Marxist-Leninist approach. Its editorials were a "guide to action from the State and County Committees" (A. 5, 10, 18, 224–233, 367–368, 373–374, 387–388; Tr. 3954; Ex. MF p. 15). It was used as a basis for educational discussions (A. 25, 37). Party meetings were regularly held to raise funds for it and to increase its circulation (A. 34, 95–96, 98, 234–235, 253–255, 292–294). It was one of the means used to recruit members (A. 589; Tr. 1586). The Party regularly exercised discipline, to the point of expulsion, over its *People's World* functionaries who failed to live up to the Party's Marxist-Leninist tenets (A. 184–186, 314–315, 584–587).

The importance of the *People's World* in achieving the Party purposes is seen in the statement of Schneiderman in 1936 when, in discharging an editor of the Party paper because of his dilettante attitude, he reminded the paper's staff that the aims of the Communist Party were still to achieve the overthrow of the existing government and to achieve a revolution in the United States and seizure of power by the Communist Party, and that the petty bourgeois tendencies that existed among some members of the staff might incline some members to forget that ultimate aim (A. 342–343, 348–349; Tr. 7731–7733).

In 1945, the Party leaders re-established the program of concentrating the Party's recruitment activities on workers in key, basic industries (Ex. 55 pp. 794, 805, 809, 813–815). Admittedly, petitioners have followed this policy since then (A. 389). "Basic industries are those upon which the whole economic system depends. They include: 1. Those which produce material for production, like steel, mining, oil, chemicals; 2. Those which deliver material to the place of production or consumption, like railroad, trucking, marine, etc. 3. Those which produce power for running the wheels of industry, electric power plants, steam and hydro-electric plants, etc." (A. 514–515). Winston said that the Party must be built in key towns and key industries such as packing, auto, railroad and maritime; that "our concentration policy should run like a red thread through all phases of Party work" (A. 600–601). Healey told Party members that they must concentrate on the recruiting of industrial workers, that is, "workers in the basic industries such as the steel industry, the auto industry, the rubber industry, the oil industry, transportation, coal mining" and that "all strikes in basic industries must be Communist-led" (A. 133, 305–306). A club chairman was told by the Los Angeles County Committee that the National Committee had directed that steel, auto, mining, electrical, maritime and railroad would be the key industries for concentration; that the Los Angeles County

Committee had chosen the local aircraft industries for concentration by certain clubs, and the oil industry by other clubs (A. 296–297). In San Francisco, the Party was concentrating on transportation (Tr. 5458–5459).

The importance of the concentration policy to the proletarian revolution is seen in the instruction at the Party's 1941 National Training School that to achieve the proletarian revolution and the dictatorship of the proletariat it was not necessary to have a numerically large Communist Party, but rather one that can influence the "decisive sections" of the American working class[14] (A. 58–60). Thus, the *History of the CPSU* (Ex. 28) teaches that the first positions occupied in the 1917 revolution were the key transportation and communication facilities, *i. e.*, "the railway stations, post offices, telegraph office, the Ministries and the State Bank" (A. 497; Ex. 28 p. 208).

An underground apparatus has long been recognized as a Party requirement; thus, the Conditions of Affiliation the Communist International stated: "In nearly all countries in Europe and America the class struggle is entering the state of civil war. Under these circumstances, the Communists can have no confidence in bourgeois legality. They must everywhere create a

[14] Stack told the 1948 California convention that building the Party among industrial workers was "basic in the achievement of our political objectives" (Ex. 186 p. 3).

duplicate illegal apparatus, which, at the decisive moment, could help the Party to perform its duty to the revolution" (A. 566; see also A. 521, 529–533).

From 1948 to 1950,[14] the national leaders were busy setting up the Party's underground structure, the plan for which Foster had brought back from Europe (A. 61–70, 76–77; Tr. 2254–2259, 2282–2289, 2324–2334). The underground Party members were to be placed into small groups operating at different levels, with any one member knowing only one person in another group, thus preserving the functioning of the underground apparatus (Tr. 2327–2334). The Party bought printing or mimeographing machines; it made plans to store paper supplies, prepare hiding places and contact places for Party leaders, furnish documents to establish new identities for Party leaders,[15] and to set up short-wave radio

[14] The Party has had a long history of underground operation and in the '30's many of these petitioners were engaged in underground Party activity (A. 262–264, 351, 521).

[15] That the program was successful is indicated when Thompson, in charge of this underground plan and one of four *Dennis* fugitives, escaped apprehension for three years and made use of this underground paraphernalia, such as secret hiding places and false identification documents. Indeed Thompson's hiding place was in California, in petitioners' bailiwick. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841. A glimpse of the underground nature of the Party was seen in the refusal of the petitioner Yates to identify her fellow defendants during the course of her examination while a witness in this trial, even on pain of imprisonment (A. 395, *et seq.*).

transmitters capable of reaching the West Coast (A. 61–70).

In accordance with the national Party policy, the California Party proceeded on a program to go underground (A. 144, 159–160, 175–176, 331–332). California members were taught how the Party would operate with an underground organization (A. 122–123). Party clubs were broken up into squads where only the squad leader was in touch with the person in the next higher Party echelon (A. 110–111, 159–160, 286–287, 318–319). After a dismountable type of mimeograph machine was demonstrated to petitioner Healey at National Headquarters, preparations were made to secure machines in California, including also a hidden printing press which a Party member, who had been placed in the Party underground, was trained to operate in order to "move the masses of people in time of crisis" (A. 67–69, 85–91, 104–105, 160–161).

An employee of North American Aviation Corp. was excluded from open Party activity in the Los Angeles area in 1950 (A. 298–300). In 1948, Party cards were destroyed and thereafter no new ones were issued (A. 282–283, 301–302; Tr. 1537). Codes were arranged for various aspects of Party activity (A. 137–138, 236–237, 250, 298–300). Elaborate safeguards were taken to insure the secrecy of the State Board or Committee meetings (A. 225–233). Concealment of the location of

Party meetings was effected by rendezvous arrangements; members were admitted only after facing a panel and being identified (A. 92–95, 110–111, 144, 186–188, 192–194, 301–305).

Two overt acts in furtherance of the proscribed conspiracy to teach and to organize involved 1949 and 1950 Party meetings honoring Lenin, chief founder of the Soviet Union and developer of the theory and tactics of proletarian revolution and the dictatorship of the proletariat. At the 1949 meeting, Steinberg, as Chairman, made several speeches, while Dobbs made the main speech. The stated purpose of the meeting was to protest against the then current Smith Act trial in New York of the twelve national leaders of the Party—the *Dennis* defendants (A. 207–211; 460). At the 1950 meeting, Schneiderman, as State Party Chairman, demanded recognition for Red China and protested any armed intervention in China. There was an appeal for funds for the Party (A. 203–205; Ex. 159A). It was at such meetings that new Party members were recruited (Tr. 3763–3768). Moreover, the record was replete with the use of such "front" issues to interest outsiders and thereby gain recruits to the Party (e. g., A. 116–117, 161–162, 199–201, 220–221; Tr. 1584–1587, 4622).

Following the Communist Political Association (CPA) interlude in 1944–1945 under Browder's

leadership,[16] a 1945 National Convention of the Party was held, with most of the *Dennis* co-conspirators and petitioners Stack, Schneiderman, Lima and Healey attending (A. 44, 73). William Z. Foster told the 1945 Convention that Browder, under the flag of the CPA, was preaching anti-Marxism and quoted Duclos' statement that this was "a notorious revision of Marxism"; that Browder would have them throw away their Marxist-Leninist classics and had often expressed "his scorn for the 'old books' and 'old formulas' by which, of course, he [Browder] means Marxist-Leninist books and formulas" (Ex. 55, p. 784). The Convention dissolved the CPA and the same delegates reconstituted the Communist Party (A. 55). A constitution was adopted basing the Party

[16] The CPA had existed in 1944–1945 while the United States and the U. S. S. R. were war allies. When the war in Europe was coming to an end, French Communist leader Jacques Duclos published an article in France condemning the Browder program of class peace as reflected in the CPA as being "notorious revisionism" of Marxism-Leninism (Exs. 42, 442, 650). Immediately on this signal, the Party leaders began a series of resolutions and statements echoing Duclos' criticism and resulting in the 1945 Convention (Ex. 42 pp. 579–590, 629–632).

Petitioner Yates, on the CPA National Committee, testified that she understood the Party was not abandoning the principles of Marxism-Leninism during the CPA period and "did not until later realize that I had helped to distort them" (A. 390). A witness, in characterizing the CPA period, stated "The name was changed, the hat was turned around" (Tr. 926). Foster stated that the task during this period as he saw it had been "to keep the CPA, in fact, if not in name, the Communist Party" (Ex. 42 p. 655).

on Marxism-Leninism. Dennis told the Convention that in view of the foregoing provision "even the blind can see" that the principle of the dictatorship of the proletariat was to be found in the Party constitution (A. 56).

At the 1945 Convention and at subsequent national committee meetings, the Party leaders directed that there be instituted systematic and organized Marxist-Leninist education which was to be guided by the Party committees (A. 75, 568; Exs. 55 p. 788, 120, p. 1122). Dennis told the National Committee that Party members were to acquire a more profound grasp of the theory and lessons to be learned from the Marxist-Leninist classics and that the Party "must give more attention to the basic training of our cadres and to the Marxist-Leninist education of our new and old members" (A. 599–600). National Headquarters sent down a directive that the Party must set up study circles in the clubs to train its members in Marxism-Leninism (A. 197).

Coincidental with the 1945 National Convention, the California Party had conventions with Schneiderman, Lambert, Lima, Stack, Yates and Carlson present at the San Francisco session; and Schneiderman, Healey and Stack present at the Los Angeles session (A. 14–16, 127–131). During the same period, Kusnitz was attending the New York State Convention (A. 45). At the San Francisco Convention, Schneiderman told the delegates that "we were going back to funda-

mental theoretical books and we were to build our libraries on Marxism, Leninism and Stalinism" (A. 15). Preceding this, Schneiderman told the "whole top committee" that "we were not giving up the revolution and dictatorship of the proletariat; we were going back to the fundamentals of Marxism, Leninism and Stalinism" (A. 13). At the Los Angeles session, the Los Angeles County Board stated that the convention had been authorized "to bring our Party back on to the line of Marxism-Leninism"; and that "our Party has rededicated itself to what Comrade Duclos termed 'the victorious Marxist-Leninist doctrine' from which, as he so correctly warned us, we had 'so dangerously swerved'" (A. 584; Ex. 329 p. 4). Dorothy Healey urged the re-education of all Marxists (A. 130–131). In accepting her election to the State Board in 1945, Stack urged the reinstitution of Marxism-Leninism, stating that the American workers would be the grave-diggers of the capitalistic government (A. 130; *Cf.* Ex. 39 p. 21).

In the years following the 1945 Convention, Schneiderman told petitioners Dobbs and Kusnitz and, at various times, other Party leaders, that the reconstituted Party must embark on immediate Marxist training, especially of Party recruits (A. 133–135, 138, 145). Yates told petitioners Dobbs, Steinberg, Healey, Spector, Kusnitz and other Party members that it was only through Marxist-Leninist training and support of

the Soviet that a system of government such as in China, Yugoslavia, Czechoslovakia, etc., could be guaranteed (A. 135–136).

. The California Party set up a series of classes and schools that extended from 1946 to 1950 (A. 33–34, 38–39, 59–61, 84–85, 97, 107–108, 175, 182–183, 197–198, 297–298, 302, 397, 431–433; Tr. 2835–2836; Ex. 204). Additionally, the Party organized the sale and distribution of the Communist Party classics for independent self-study in mastering Marxism-Leninism (A. 36–37, 186–192, 196–197, 278, 289, 316, 320–321, 413). Members who occupied Party positions even on a club level were required to be especially well-grounded in the fundamentals of Marxism-Leninism (A. 201–202, 310–312, 315, 377–378, 586–587).

The principles of Marxism-Leninism were taught in these Party schools and classes. The content of this teaching was established by testimony as to the oral teaching of Party instructors and by documentary evidence consisting of written study outlines for self-study and class use. These outlines consist in large part of assigned reading in Marxist-Leninist texts which were introduced in evidence. Viewing the evidence strictly, the study outlines fall into two groups. The first group consists of three substantially identical study outlines (Exs. 93, 626 and 613; A. 612–620) prepared, respectively, by the National Headquarters of the Communist Party, the California state organization of the Party,

and the Los Angeles Party. According to petitioner Yates, they were used in California on a "state scale"; they were also used in classes in San Francisco, Los Angeles and San Diego (A. 33–34, 175, 431; Tr. 3866–3867). These are identical with the study outline introduced in the *Dennis* case (Ex. 9 X Z) which was used by the Government in that case in its brief to this Court (pp. 117–140) in illustration of the Party's Marxist-Leninist program. These three outlines were used in Party schools and classes in California following the reconstitution of the Party in 1945. While the evidence does not affirmatively show their use in California later than 1946, it does show that they were used in New York as late as 1950 (A. 61). The second group consists of study outlines (Exs. 163, 450, 201, 213, 214; A. 620–640) used by the California Party in Marxist institutes conducted in Los Angeles and San Francisco in 1949–1950 (A. 85, 96–98, 107, 108, 297, 298). Exhibit 163 was prepared by petitioners Yates and Schneiderman (A. 397).

Lesson I of the first group of outlines (Exs. 93, 613 and 626) is an introduction to Marxist-Leninist theory. It sets forth the Leninist slogans, "Without a revolutionary theory there can be no revolutionary movement" and "Our teaching is not a dogma but a guide to action," as showing that Marxist-Leninist theory defines the Party's methods and objectives.

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At a class for new members the Party instructor read the following from *Problems of Leninism* (Ex. 146, pp. 19–20) (assigned for study in lesson VII of the outlines) and told the neophytes that both Lenin and Stalin had there agreed that the change of government in the United States could not occur peacefully, that there must be a violent overthrow of the government and a complete smashing of the capitalistic processes (A. 182–183):

> Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat?
>
> Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adapted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution.

A San Diego school using the outline (Ex. 626) was taught that a precondition was a Communist Party, "to lead the revolution after the armies, navies and the police force, and so on and so forth, had been crushed; that it was very necessary that there would be a vanguard party, namely, the Communist Party, to lead these

people after and during such an uprising" (Tr. 1786).[17]

The assignment from *State and Revolution,* for lesson IV of the outlines, is an excerpt in which the view that Marx contemplated that the revolution would be a gradual development rather than "a seizure of power" is dismissed by Lenin as a "vulgar interpretation"; "as a matter of fact, *exactly the opposite is the case.* Marx's idea is that the working class must *break up, shatter* the 'ready-made state machinery,' and not confine itself to merely taking possession of it" (Ex. 11, p. 33). Marx's confinement of violent destruction of the state to the European continent is rejected by Lenin in view of subsequent developments in England and the United States (Ex. 11, p. 34):[18]

[17] Compare the similar statements in the reading assigned from *Problems of Leninism* (Ex. 146, pp. 31–38) and *Foundations of Leninism* (Ex. 1, pp. 109–111) and Stack's statement that the Communist Party was the instrument through which the capitalist government would be overthrown (A. 29–30). This was in harmony with what was taught at the 1941 National Training School that among the conditions for the proletarian revolution was a strong Communist Party in the United States "not necessarily large and big numerically, but a Party that has influence, influence that it can exert to influence the decisive sections of the American working class" (A. 59–60).

[18] See also the reading assigned in *Foundations of Leninism* (Ex. 1, pp. 55–56) where Stalin also says that America is no exception to the law of violent proletarian revolution.

Compare the statement of old-time Party member "Mother Bloor" to Schneiderman, Yates, Lambert and other members that they "were on the threshold of the revolution," that she

> Today, in 1917, in the epoch of the first great imperialist war, this exception made by Marx is no longer valid. Both England and America, the greatest and last representatives of Anglo-Saxon "liberty" in the sense of the absence of militarism and bureaucracy, have today plunged headlong into the all-European dirty, bloody morass of military bureaucratic institutions to which everything is subordinated and which trample everything under foot. Today, both in England and in America, the "precondition of any real people's revolution" is the *break-up,* the *shattering* of the ready-made state machinery" (brought in those countries, between 1914 and 1917, to general "European" imperialist perfection).

In connection with a question at a club educational as to how socialism could be brought about, a Party teacher, in pointing out that a majority was not needed, stated that once in power, the proletariat had the obligation to shatter the state machinery and thereafter they could begin to satisfy the demands of those whom they were seeking as allies; that "the actual taking over of the Government would be violent, and that there could be no chance of a peaceful overthrow" (A, 197–198). To buttress his statement, the teacher referred to *Problems of Leninism* (Ex. 146—cited in the outlines, Lesson VII):

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would "live to see the bloody battle through" and "there will be blood flowing in the streets" (A. 369–372).

There, Stalin says that the dictatorship is not a "popular," "elected" or "non-class" government, "and does not deceive either itself or others by talk about popular, elected [19] government, sanctified by the whole people." It is an alliance between the proletariat which has seized power and numerous non-proletarian workers (the farmers, intelligentsia, etc.) which is developed "in the circumstances of furious civil war" and for the purpose of completely overthrowing capital and suppressing the resistance of the bourgeoisie (*ibid.*, pp. 22–23).[20] The assertion that the proletarian revolution must depend on the majority of the population supporting it is quickly disposed of as the view of "the henchmen of the bourgeoisie." That support, say Lenin and Stalin, will come with a victorious revolution. Thus, the teacher read the following (*ibid.*, pp. 20–21):

> Let the revolutionary proletariat first overthrow the bourgeoisie, break the yoke of capital, break up the bourgeois state apparatus. Then the victorious proletariat will speedily gain the sympathy and sup-

[19] When Lambert was asked if the Party was planning revolution by bullets instead of ballots, Hursel Alexander answered for him, stating, "Just what the hell do you think we are purging the Party for?" (A. 329).

[20] Stack was taught at the Lenin Institute in Moscow, "that it was the duty of the students of their respective countries to work to overthrow their own Governments and to set up the dictatorship of the proletariat as a guarantee that the Government that was overthrown would not regain its power" (A. 218–219).

port of the majority of the toiling non-proletarian masses by satisfying their wants at the expense of the exploiters. * * *

"In order to win the majority of the population to its side," Lenin continues, "the proletariat must first of all overthrow the bourgeoisie and seize state power and, secondly, it must introduce Soviet rule, smash to pieces the old state apparatus, and thus at one blow undermine the rule, authority and influence of the bourgeoisie and of the petty-bourgeois compromisers in the ranks of the non-proletarian toiling masses. Thirdly, the proletariat must *completely and finally destroy* the influence of the bourgeoisie and of the petty-bourgeois compromisers among the *majority* of the non-proletarian toiling masses by the *revolutionary* satisfaction of their economic needs *at the expense of the exploiters.*"

In a discussion of the outline (Ex. 626), a class was told that a majority was not necessary for the revolution "that at a time when great stress, for instance, at the time of war amongst countries, it might be possible for the Communist Party of one of the warring countries to take advantage of such a situation and that under such circumstances, because so many of the people in this country would be deployed fighting a war, it would then be possible to cause internal strife and a civil war, and thereby it would be possible to bring into effect the dictatorship of the proletariat without the necessity of having a ma-

jority of the working class in favor of it at that particular time". (A. 38–39). The following from the reading assigned for Lesson VIII from *Foundations of Leninism* (Ex. 1, p. 22) was then read to the class (A. 40):

> Concerning the conditions for the seizure of power by the proletariat. The opportunists assert that the proletariat cannot and ought not to take power unless it constitutes a majority in the country. No proofs are adduced, for there are no proofs, either theoretical or practical, that can justify this absurd thesis. Let us assume that this is so, Lenin replies to these gentlemen of the Second International; but suppose a historical situation has arisen (a war, an agrarian crisis, etc.) in which the proletariat, constituting a minority of the population, has an opportunity to rally around itself the vast majority of the labouring masses; why should it not take power then?

In the final lesson (Lesson IX) in the outlines, the students are referred to *Strategy and Tactics* (Ex. 147) where the strategy of the revolution is set forth: When the masses are in a state of revolutionary ferment, and ready for action, the Party of the proletariat must lead the masses to a direct attack upon the bourgeois state. This it does by organizing mass action including "a combination of strikes and armed demonstrations and finally, the general strike conjointly with armed insurrection against the state power

of the bourgeoisie. The latter form of struggle, which is the supreme form, must be conducted according to the rules of war" (Ex. 147 p. 66; A. 527-528).

That the Party here regards the general strike as an integral part of the course to revolution is seen in the reference by a Party official in 1946 to the Communist-inspired San Francisco general strike of 1934.[21] The official read Engel's definition of revolution as being "the most authoritative thing possible; it is an act in which one section of the population imposes its will upon another section of the country by means of rifles, bayonets, cannon" (Ex. 492 p. 47, A. 541). She

[21] At a meeting in Moscow of the Communist International (CI) in 1934, the American Communist Party was ordered to start a general strike in San Francisco. Schneiderman, the American Party representative to the CI, in voting for the strike, stated that the situation was ripe for such a general strike, and agreed that a general strike would offer an excellent rehearsal for seizure of power in the United States by the American Communist Party (A. 336-339, 346-350). Later, the Party, in its publication, *The Communist*, claimed credit for the general strike which subsequently took place and considered it a success. The Party gave as a reason for the "incompleteness" of the strike the failure "to stop the bourgeois newspapers from publishing" and "failure of the workers in the communications systems, such as telephone and telegraph, to join in the strike;" except for this, "the entire struggle would have reached a higher political level, because the question of the ability of the capitalist State to function would have been far more critical for the bourgeoisie than it was" (Ex. 738; A. 607-610). As an aftermath, Schneiderman reminded Party members in 1936 that such general strikes were rehearsals for seizure of power by the Party and the working class (A. 340-342).

compared the violence that occurred in the Paris Commune with the 1934 San Francisco strike, stating that it was the closest thing that had ever happened in this country; "that here was an example where labor held power for a period of two or three days, and had the political development of the people been advanced, had the Party laid a proper background and proper foundation of education among the masses, that an incident like that can be transferred into the revolutionary period; that you can go from a strike into a revolutionary action without too much difficulty." The Party members were told "that was the reason why we must recruit and must point out the fallacies of capitalism; so that when the situation may arise in the future, that we would be much better prepared for action" (A. 153–155).

The second group of outlines which were used in the Marxist Institutes held in Los Angeles and San Francisco in 1949–1950 (Exs. 163, 450, 201, 213, 214; A. 620–644) also referred the students to substantially the same Marxist-Leninist classics as had the earlier outlines [22] (e. g. Tr. 2749–2793).

[22] Nowhere have petitioners denied the use of these Marxist-Leninist texts as part of their program. Indeed, petitioner Yates admitted the use in the Party of the volumes of the "Little Lenin Library" containing most of the Marxist-Leninist texts, since "in the preamble to the Constitution it states that the Communist Party bases itself upon the principles of scientific socialism, Marxism-Leninism, the main principles of which are to be found in these so-called Classics" (A. 413–414).

And in at least one of the Institute schools the students were taught that the "pre-conditions" for the socialist revolution would have to be developed over a period of time, but as soon as conditions were set for socialism, the change would be a sudden and violent outburst (A. 119–120).

These outlines, however, prepared after the *Dennis* indictment, also referred to non-Marxist texts of an innocuous nature and contained statements disclaiming the use of force and violence. The evidence showed, nevertheless, that many of these non-Marxist texts were never used in the classes (A. 103–104). We have set out in full "Session" 8 of the outline (Ex. 163) prepared by Yates and Schneiderman which purports to renounce the use of force and violence (A. 622–626). Woven into this session, as examples of revolution, are "American Revolution of 1776, French Revolution, Russian Revolution in 1917" (A. 622), all examples of the use of force and violence in achieving power. Also used as an example was the so-called "eastern democracies following World War II". So that the students could be doubly sure that the Party leaders were not guilty of a "revisionism" of the Marxist-Leninist tenets of force and violence, the outlines set forth quotations from Marx and from American sources on the "right" of violent revolution (A. 623).

SUMMARY OF ARGUMENT

1. The evidence amply sustains the jury's verdict that the petitioners conspired with the *Dennis* defendants to teach and advocate, and to help to organize the Communist Party to teach and advocate the overthrow of the Government of the United States by force and violence. Petitioners are the principal organizers and leaders of the Communist Party in California. The evidence clearly established that they worked in close and disciplined concert to recruit members for the California Party, and organized classes and study groups to indoctrinate such members in the principles of Marxism-Leninism. Testimony as to the teaching of Party instructors in these classes and the written study outlines prepared and used in these classes, both immediately before and during the period covered by the indictment, constituted clear and convincing evidence that this Marxist-Leninist indoctrination as organized by petitioners included advocacy of the violent overthrow of the Government of the United States and that petitioners had conspired with the specific intent of bringing about such overthrow as speedily as circumstances would permit.

The First Amendment's guarantee of freedom of press did not preclude the conviction of petitioners Richmond and Connelly. As editors of *The People's World*, a publication established, supported and strictly controlled by the Com-

munist Party in California, they were convicted of playing active and leading roles in the overall conspiracy charged in the indictment.

2. Petitioners admit (Pet. 76) that the Government alleged and proved as overt acts the participation of petitioners Steinberg and Schneiderman in Lenin Memorial meetings conducted by the Communist Party in California in 1949 and 1950, respectively. Contrary to petitioners' apparent contention, such overt acts need not constitute crimes in themselves. *Braverman* v. *United States*, 317 U. S. 49, 53. Participation in meetings to strengthen and maintain the Communist Party obviously was in furtherance of the petitioners' conspiracy.

3. Petitioner Schneiderman contends that under principles of *res judicata* and collateral estoppel this Court's decision in *Schneiderman* v. *United States*, 320 U. S. 118, precluded the Government from litigating with him in this Smith Act prosecution issues relating to the methods and objectives of Marxism-Leninism and his understanding of them. It is clear that none of this Court's conclusions in the *Schneiderman* case as to the nature of Marxism-Leninism in 1927, or as to petitioner's beliefs and activities in 1927 "was a determination favorable to petitioner of the facts essential to conviction" under a Smith Act indictment returned in 1951. *Sealfon* v. *United States*, 332 U. S. 575, 578–579. Accordingly,

principles of *res judicata* or collateral estoppel have no application here.

4. It was not error for the trial judge to refuse to charge the jury that they could not convict unless they found that the petitioners intended that the teaching and advocacy of the violent overthrow of the government which was the object of the conspiracy would be couched in language reasonably and ordinarily calculated to incite persons to violent action to overthrow the government. Nothing in this Court's decision in *Dennis* v. *United States,* 341 U. S. 494, requires that such a specific charge as to "incitement" be given to the jury. The sole function of such a charge would be to draw a line between discussion protected by the First Amendment and the advocacy of political violence which Congress may prohibit. Here, the trial judge emphasized this distinction by instructing the jury that petitioners could not be convicted for opinions, beliefs, or predictions—but only for advocacy, and that before the jury could convict they must find that petitioners specifically intended to bring about the violent overthrow of the government as speedily as circumstances would permit.

Since such an instruction as to "incitement" was not required by *Dennis,* it is immaterial that the court below may have believed that it was the revision of 18 U. S. Code in 1948 which made such an instruction unnecessary.

5. It is not entirely clear that the trial judge made a finding that petitioners' conspiracy occurred in such a context of world conditions as to create a "clear and present danger" to vital interests of the United States. Such a finding involves a conclusion of law to be drawn by judges rather than by jurors. *Dennis* v. *United States,* 341 U. S. 494, 513, 515. If it was not made by the trial judge, it clearly was made by the court below, which found as had the Court of Appeals for the Second Circuit in *United States* v. *Flynn,* 216 F. 2d 354, certiorari denied, 348 U. S. 909, that world conditions in 1951 were not less dangerous than at the time of the *Dennis* trial.

6. The petitioners urge that the organization of the Communist Party was completed when it was first formally created with a constitution and officers and committees, and that the trial judge erred in instructing the jury that "organize" as used in the Smith Act "includes the recruiting of new members and the forming of new units" etc. To the contrary, by the "organize" clause of the Smith Act, Congress clearly sought to reach not merely those who create an organization on paper but also and primarily those who by continuous recruitment and indoctrination of members for illegal objectives create the real danger with which Congress is concerned. Petitioners' argument that Congress adopted the

Smith Act from the California Criminal Syndicalism Act and must be presumed to have adopted the California courts' prior construction of "organize" as including only the initial creation of an organization is without merit. For the legislative history of the Smith Act shows that it was largely modeled upon the New York criminal anarchy statute (involved in *Gitlow* v. *New York*, 268 U. S. 652) under which the New York courts had never so construed "organize" as used in that statute.

7. The trial judge did not abuse his discretion in denying petitioner's motion for a continuance because of the newspaper publication, before and in the first days of the six-months' trial, of Philbrick's articles describing his experiences in the Communist Party. The articles made no reference to petitioners, and the trial judge satisfied himself on voir dire that none of the jurors had read them.

Similarly, the trial judge did not err in denying a motion for a mistrial based upon publicity incident to the release by a Senate subcommittee of a pamphlet (furnished a month earlier at its request by the Federal Bureau of Investigation) concluding that the Communist Party advocates the violent overthrow of the Government of the United States. This pamphlet, consisting of statements of Communist leaders here and abroad, made no reference to any of the peti-

tioners. The petitioners complain that the trial judge erred in refusing to ask the jurors whether they had read or heard of the report, asserting that affirmative answers would have required a mistrial. To the contrary, jurors' knowledge of publicity adverse to a defendant does not create a presumption of prejudice. *Holt* v. *United States*, 218 U. S. 245, 250–251; *Finnegan* v. *United States*, 204 F. 2d 105, 110 (C. A. 8). Petitioners should not now be heard to complain since they rejected the trial judge's offer to ask the jurors whether they had read or heard of the report *and* if they felt that they had been influenced by it.

ARGUMENT

The petitioners, as the principal organizers and leaders of the Communist Party in California, have been convicted of conspiring with the defendants in *Dennis* v. *United States*, 341 U. S. 494, to teach and advocate, and to help to organize the Communist Party to teach and advocate, the violent overthrow of the Government of the United States. The petitioners' dominant role in the Communist Party in California is undisputed. Their convictions were based upon evidence closely paralleling that adduced in the *Dennis* case and upon the principles enunciated by this Court in that case. Their activities were carried on the same context of world conditions which in *Dennis* and in *United States* v. *Flynn*,

216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909, was held to justify the application of the Smith Act. Their convictions have been affirmed, and there is no occasion for further review by this Court.

1. *The sufficiency of the evidence.* Petitioners contend that as to each of them the evidence was insufficient to sustain their convictions under the conspiracy charged in the indictment, and that "Unless membership and officership in the Communist Party alone establish participation in the illegal conspiracy charged herein and the requisite specific intent, there is absolutely no basis for the conviction of these petitioners" (Pet. 47–76). We contend, to the contrary, that the evidence clearly supported the convictions in the following respects.

Petitioners do not deny, nor could they, that they have collectively organized, led and directed the Communist Party in California; in fact, no one of the petitioners seeks to dissassociate himself from the joint leadership of the California Party. It is established by the jury's verdict that what petitioners did jointly they did in agreement with the *Dennis* defendants—within the national framework of the Duclos-dictated reconstitution of the Communist Party in 1945. It is undisputed that petitioners (and their co-conspirators) collectively organized and directed the network of Party classes and study groups in Cali-

fornia,[23] and in which principles of Marxism-Leninism were taught. The admitted purpose of the advocacy which was the object of the conspiracy was to recruit followers and indoctrinate them in Marxist-Leninist principles—whatever they might be. As petitioner Yates put it, her duties as State organizational secretary "consisted of helping to organize recruiting drives in order to build the Communist Party and make it a bigger organization" (A. 393). The Marxist-Leninist texts used in these schools on their face advocate the use of violence to overthrow existing governments (including the Government of the United States) in favor of a proletarian dictatorship. Class and self-study outlines prepared and used by

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[23] Compare the statement of the *Dennis* defendant Davis who testified in that case, as follows:

> * * * I have a responsibility because of the fact that I am a member of the National Committee, a member of the National Board, and what is taught in our schools is determined by the policies which we are following at the particular time. * * * I have participated in discussions where the policies to be taught in the schools were outlined and decided. I have assisted in the preparation of outlines based upon decisions made by our National Committee. I have been to some schools; I have given a lecture here and there at a school, * * * and I have heard reports from Mr. Stachel who is our Educational Director, which reports were subject to the action and decision of the National Committee of the Communist Party. [*Dennis*, Joint Appendix, pp. 8441–8442.]

While the responsibility is no greater than in *Dennis*, petitioners' control is closer, since the evidence showed that most of the schools and classes were held in petitioners' California state and county Party organizations.

the Party in California between the reconstitution of the Party in 1945 and the *Dennis* indictment in 1948 specifically directed attention to the basic view of Communist leaders that they will obtain power only by physical violence, and amply supported the jury's finding that petitioners conspired with the requisite intent. Indeed, the requisite intent could be found from the more cautious teaching outlines, such as that prepared by Schneiderman and Yates, used in petitioners' Marxist institutes in 1949 and 1950, with their emphasis on the American, French and Russian revolutions, the experience of the east European "democracies" following World War II, and the alleged right of revolution. In brief, the agreement or concert of the petitioners is undisputed, and the jury's finding as to its illegal purpose and petitioners' intent is amply supported by proof of what petitioners actually did to further it.

Petitioners Richmond and Connelly have petitioned separately (Pet. No. 310) on the grounds of the insufficiency of the evidence as to them. Petitioners attempt to disguise their membership in the conspiracy by picturing their activity as the exercise of freedom of the press protected by the First Amendment. Under the charge of the trial judge, these petitioners were not convicted for editing a newspaper, but for membership in a conspiracy advocating the violent overthrow of the Government. The First Amendment does not protect the activities of newspaper editors if

those activities are an adjunct to a conspiracy such as that here charged. *United States* v. *Lebron*, 222 F. 2d 531, 536 (C. A. 2), pending on petition for certiorari, No. 139 Misc. The evidence showed that it is a Marxist-Leninist tenet that a Party newspaper is necessary to a successful revolution (*supra*, pp. 19–21). That these two petitioners were busy implementing this Party principle constitutes no basis for exempting them from the prohibitions of the Smith Act.

The activities of petitioners Richmond and Connelly in the conspiracy were no different from those of the other petitioners. They had been active in the State and County committees of the Party which, as we have shown, was where control over the Party apparatus, including Party newspapers, schools and classes was exercised. Their positions as editors do not insulate them from the consequences of the conspiracy any more than did the functioning in similar positions of the *Dennis* petitioners Davis and Gates.

2. *The sufficiency of the overt acts.* Petitioners concede that there was proof of two overt acts within the period (Nos. 13 and 16 in the indictment) consisting of the attendance of Steinberg at a Lenin Memorial meeting in 1949 and the attendance of Schneiderman at a Lenin Memorial meeting in 1950 (Pet. 76). However, they are apparently contending that neither of these acts involved any advocacy or teaching of political

violence, and therefore cannot constitute the overt acts required by the general conspiracy statute.

This Court has reiterated that "The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime." *Braverman* v. *United States,* 317 U. S. 49, 53. While we assume that the required overt act must be pursuant to or in furtherance of the conspiracy, we submit that this condition was satisfied here by the leading roles played by Steinberg and Schneiderman at public meetings admittedly designed to strengthen the Communist Party (Statement, *supra,* p. 26).

3. *Schneiderman's res judicata contention.* Petitioner Schneiderman contends in his separate petition that, under principles of *res judicata* and collateral estoppel, the decision and judgment of this Court in *Schneiderman* v. *United States,* 320 U. S. 118, precluded the Government from relitigating with Schneiderman in this Smith Act prosecution issues relating to the nature, methods and objectives of Marxism-Leninism, or the nature of the principles of Marxism-Leninism as understood and taught by Schneiderman.

Schneiderman v. *United States,* 320 U. S. 118, decided by this Court in 1943, arose out of a civil proceeding brought by the United States to cancel Schneiderman's naturalization certificate granted in 1927 on the ground that in 1927 and the preced-

ing five years he had not behaved as a person "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same" in that "during all of said times [Schneiderman] was a member of and affiliated with and believed in and supported the principles of certain organizations then known as the [Communist Party], whose principles * * * advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence." We submit that none of this Court's conclusions in *Schneiderman* as to the nature, methods and purposes of Marxism-Leninism in 1927 or before, or as to the character of Schneiderman's beliefs, teaching and activities in 1927 or before, "was a determination favorable to petitioner of the facts essential to conviction" under the indictment in the instant case, which was returned in 1951 following the re-constitution of the Communist Party in 1945. *Sealfon* v. *United States*, 332 U. S. 575, 578–579.

4. *The charge.*[24] The trial judge instructed the jury that "It must also appear beyond a reasonable doubt from the evidence in the case that such defendant had the further specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstancies

[24] The instructions to the jury in this case are printed in 106 F. Supp. 927–940.

would permit." 106 F. Supp. at 939. However, petitioners contend (Pet. 21–29) that the trial judge erred in refusing to charge the jury that in order to convict they must find that the petitioners conspired with the intent that the teaching and advocacy contemplated by the conspiracy be by language reasonably and ordinarily calculated to incite persons to violent action to overthrow the government. We contend that such a specific instruction as to "incitement" is not required by this Court's decision in *Dennis* v. *United States, supra.*

As petitioners point out, the charges to the juries in the *Dennis* and *Flynn* cases and in *Frankfeld* v. *United States,* 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922, contained language suggesting that the teaching and advocacy of violent overthrow of the government which is prohibited by the Smith Act must be in "language reasonably and ordinarily calculated to incite persons to such action". See Judge Medina's charge in the *Dennis* case, quoted in 341 U. S. at 511–512. Indeed, since the charge in *Dennis* had withstood scrutiny by this Court, the government urged that similar language be included in the instructions to the jury in the instant case.

However, it is clear that nothing in the *Dennis* decision requires that Judge Medina's instructions be used verbatim in all other Smith Act prosecu-

tions. More important, this Court's opinions in *Dennis* show that the function of a charge with respect to language of incitement to political violence is simply to draw a clear distinction between discussion protected by the First Amendment and the advocacy of political violence which Congress may validly proscribe. Chief Justice Vinson's opinion pointed out that the Smith Act "is directed at advocacy, not discussion", and that Judge Medina "properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' * * *" and that such a charge "illustrates the meaning to be placed on those words". 341 U. S. at 502. Similarly, in his concurring opinion, Mr. Justice Frankfurter noted that "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken," and "there is underlying validity in the distinction between advocacy and the interchange of ideas." 341 U. S. at 545, 546. Applying this distinction to the *Dennis* defendants, Mr. Justice Frankfurter concluded that "The object of the conspiracy before us is so clear that the chance of error in saying that the defendants conspired to advocate rather than to express ideas is slight." *Ibid.*

Accordingly, it is clear that while this Court has indicated that in a Smith Act prosecution the jury must be instructed as to the distinction between discussion of ideas and advocacy of political violence, it has never suggested that the distinction must be phrased in terms of incitement.

We submit that the distinction was sufficiently made by the trial judge's instruction that the jury could convict petitioners only if it found that they had conspired to advocate and to organize the Communist Party to advocate the violent overthrow of the government with the specific intent to cause or bring about such overthrow "as speedily as circumstances would permit." Conspiring to advocate such overthrow with intent to bring it about as soon as possible is indistinguishable from conspiring to so advocate with the intent that such advocacy be "by language reasonably and ordinarily calculated to incite persons to such action." Those who seek to cause the violent overthrow of the government as speedily as circumstances permit can scarcely assert that their advocacy of such overthrow is not intended to induce others to join in effectuating that purpose. Indeed, in classes and study groups organized by these petitioners they insist that "Our teaching is not a dogma but a guide to action" (see Statement, *supra*, p. 31). Under either form of instruction, the line is drawn between academic discussion of communism and advocacy of political violence.

Moreover, the trial judge went on at length to distinguish between a conspiracy "to advocate rather than to express ideas" in the following instruction (106 F. Supp. at 934):

> As used in the Smith Act and the indictment:
>
> (1) the word "advocate" means to urge or "to plead in favor of; * * * to support, vindicate, or recommend publicly * * *.";
>
> (2) the word "teach" means "to instruct * * * show how * * * to guide the studies of * * *";
>
> (3) the word "force" means the use of physical power other than the power of oral and written speech;
>
> (4) the word "violence" means the use of great and destructive force.
>
> The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy.
>
> Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.

> The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.[25]

Thus, the trial judge forcefully instructed the jury that they could convict only if they found that the advocacy which was the object of the conspiracy was advocacy of the violent overthrow of the government—advocacy carried on with the purpose of inducing a sufficient number of people to effect such overthrow, rather than discussion or the expression of beliefs or predictions protected by the First Amendment.[26]

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[25] It is worthy of note that two other trial judges thought that an instruction almost exactly like the one here correctly defined the meaning of the term "advocacy". *Fujimoto* v. *United States*, No. 13951, and *Huff* v. *United States*, No. 14320, both pending on appeal to the Ninth Circuit.

The Government in the latter case offered an instruction on incitement similar to that in *Dennis* because the defendants in the instant case had already argued on appeal that it was error not to give the instruction. The *Huff* defendants specifically objected to the Government's proposed instruction stating that the trial judge, using the instruction under criticism here, "correctly states the law and correctly defines the Act and correctly analyzes the law in that regard." (*Huff*, Reporter's Transcript, pp. 13097–13099.) Those defendants of course have not raised this issue on appeal.

[26] The trial judge in this case went to greater lengths than did the *Dennis* trial judge to make sure that these petitioners were not convicted for language which was merely provoca-

It seems likely that petitioners' insistence upon the necessity for an instruction as to "incitement" is simply a veiled attempt to argue that the First Amendment precludes the application of the Smith Act to advocacy of the violent overthrow of the government until an attempt at such overthrow is "imminent". This contention that the entire recruitment and indoctrination phase of a totalitarian political movement is protected by the First Amendment was rejected by this Court in *Dennis* v. *United States,* 341 U. S. at 509–510.

Petitioners also assert (Pet. 29–35) that the court below sustained their convictions only by drawing erroneous conclusions as to the significance of the 1948 revision of 18 U. S. Code which deleted the special conspiracy provision of the Smith Act which was involved in the *Dennis* case, with the result that the indictment in the instant case charged a conspiracy under the general con-

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tive or challenging, or stirring, or disputatious. The trial judge explained to the jury the broad rights of defendants protected by the First Amendment "to hold, express, teach and advocate opinions." He charged that defendants have a right to criticize our system of Government and the Government itself, "even though the speaking or writing of such criticism may undermine confidence in the Government or cause or increase discontent." "They have the right also to criticize the foreign policy of the United States * * * and to praise the foreign policy of other governments * * *." The court further instructed that the right of freedom of expression included opinions spoken which seemed "crudely intemperate, or to contain falsehoods, or to be designed to embarrass the Government." 106 F. Supp. at 935.

spiracy provision (18 U. S. C. (1948 ed.) 371) to commit offenses under Section 2 of the Smith Act (18 U. S. C. (1948 ed.) 2385). The contention is without merit.

The court below thought that these petitioners had certain legal advantages over the *Dennis* defendants, such as the requirement under 18 U. S. C. 371 of proof of an overt act, that proof of membership or holding office in the Communist Party would not constitute "*per se*" a violation of the Smith Act in view of the enactment of Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f)), and that petitioners were more particularly informed of the charge they had to meet by virtue of the inclusion in the indictment of an allegation of petitioners' specific intent to cause the violent overthrow of the Government "as speedily as the circumstances would permit." (Pet. App. 10–15.) The Court of Appeals believed that petitioners had the further advantage of access to the large body of standardized law and procedure developed under the general conspiracy statute, 18 U. S. C. 371 (Pet. App. 16).

The Government has never contended that the 1948 revision of 18 U. S. C. (or Section 4 (f) of the Internal Security Act) effected or was intended to effect a drastic change in the issues of a Smith Act prosecution. However, it is immaterial in this case whether the Court of Appeals was correct in its view that the 1948 revision

made significant changes in the Smith Act. For while petitioners contend that it was this view of the Court of Appeals which led it to hold that the trial judge was not required to charge the jury in terms of "incitement" (Pet. 30–31), we have shown that such a specific charge was not required under the original Smith Act as interpreted by this Court in *Dennis* v. *United States*, *supra*.

5. *The finding of "clear and present danger."* Petitioners contend that the trial judge failed to make a finding as to the existence of such a "clear and present danger" as would warrant their conviction under the Smith Act, and that he failed to make such a finding because he erroneously equated "clear and present danger" with petitioners' specific intent, as determined by the jury's verdict, to bring about the overthrow of the Government by force and violence as speedily as circumstances would permit. In view of the statements made by the trial judge in his opinions in ruling upon motions to dismiss the indictment and for a judgment of acquittal (Pet. App. 64, 135–137 (also reported in 102 F. Supp. at 96 and 106 F. Supp. at 923)), it is possible that he regarded the existence of such a specific intent as satisfying any prerequisite of a "clear and present danger." However, it should be noted that on both occasions the trial judge referred to the portion of Chief Justice Vinson's *Dennis* opinion (341 U. S. at 508–511) affirming the find-

ing of "clear and present danger" in that case. Thus, it is probable that the trial judge was adopting the language of that opinion as his finding in this case. In any event, we contend that since the determination of the requisite degree of danger involves a question of law for the judge, rather than the jury, it can be made or articulated by an appellate court, as it was in the *Dennis* case, and it was made in this case by the Court of Appeals.

In *Dennis* v. *United States,* 341 U. S. at 510, Chief Justice Vinson's opinion held that the clear and present danger concept, as applied to the Smith Act, means that:

> * * * In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

It was specifically held (p. 513) that this "is a judicial rule to be applied as a matter of law by the courts" and that (p. 515) "the issue is properly one for the judge to decide." The determination to be made is whether there exist circumstances, including the nature of the Communist Party, the international relationships of the United States, and the recent activities of Communist groups and states throughout the world, which would justify Congress in concluding that the petitioners' conspiracy endangers fundamental interests of the nation. 341 U. S. at 510–511.

The method by which this determination is to be made was described by Mr. Justice Frankfurter in his concurring opinion, as follows (341 U. S. at 547):

> * * * But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

At the *Dennis* trial (see 341 U. S. at 510), Judge Medina merely told the jury that if they found that the defendants had violated the Smith Act as he had interpreted it,

> I find as matter of law that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.

However, it was the Court of Appeals for the Second Circuit in its *Dennis* opinion which for the first time articulated this finding by evaluating the defendant's conduct, as found by the jury, in the context of world conditions. Since such an evaluation is a question of law for judges, it could be made in the instant case by the Court of Appeals as well as by the trial judge. Here, the indictment covered the period 1948–1951—the same period covered by the indictment in *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909. In affirming the conviction of the *Flynn* defendants, the Second Circuit held that "if the danger was clear and present in 1948 [the date of the *Dennis* indictment], it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war." 216 F. 2d at 367. And in the instant case, the court below came to the same conclusion, stating that "world conditions at the date of [the *Dennis*] trial had not changed for the better when trial in the instant case was had." (Pet. App. 6). Indeed, a contrary conclusion would have warranted review by this Court.

The related contention that it was necessary for the trial judge or jury to find that these petitioners by themselves possessed "power to cause any attempted forcible overthrow of the Government" (Pet. 38–40) glosses over the integrated

and disciplined character of the Communist Party of the United States and embodies the test of imminent political violence which was rejected in *Dennis*. 341 U. S. at 509.

6. *The meaning of "organize" as used in the Smith Act.* Petitioners contend (Pet. 41–46) that the trial judge erred in instructing the jury that

> The verb "organize", as used in the Smith Act and the indictment, includes the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization. [106 F. Supp. at 935–936.] [11]

They argue that "the Communist Party is organized when it comes into being and is endowed to function as the Party", that this occurs "when at a formal convention a constitution is adopted and officers and committees elected", and that this event occurred in 1945 (Pet. 44–45). Accordingly, they contend that the trial judge should have instructed the jury that the three-year statute of limitations barred conviction under the organizing branch of the indictment. We contend that the trial judge interpreted the word "organize",

[11] Paragraph 3 of the indictment charged that as a part of the conspiracy petitioners and their co-conspirators "would cause to be organized groups, clubs, sections, and district, state and national units of said party * * * and would recruit, and encourage recruitment of, members of said party, concentrating on recruiting persons employed in key basic industries and plants."

as used in the Act, in the only way consistent with the clear purpose of Congress.

The creation of a group such as the Communist Party is a continuing process. Congress was not concerned with the legal and parliamentary mechanics by which a paper organization was established, but it was concerned with continuing activity to recruit and indoctrinate members and to organize them into various units or branches. By separately referring in Section 2 of the Smith Act to persons who organize or help to organize "any society, group, or assembly of persons", Congress sought to reach the leaders of such groups.

Petitioners' construction of "organize" would obliterate the organizing or leadership clause of the Act. This is illustrated by the fact that under their interpretation the "organize" clause of the Smith Act, enacted in 1940, could never have been applied to the leaders of the Communist Party of the United States which was first organized long before 1940, except for the fortuitous interlude of the Communist Political Association in 1944–1945.

To avoid the principle that statutes will not be given an absurd interpretation which frustrates a clear legislative purpose, petitioners assert that Congress modeled the Smith Act upon the California Criminal Syndicalism Act under which the word "organize" was construed by the California courts as embracing only the initial creation of an

organization. Accordingly, they contend (Pet. 43) that it must be presumed that Congress intended to use the word "organize" in the Smith Act with the meaning given to it by the California courts, citing for this contention *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 304–8; *James* v. *Appel*, 192 U. S. 129, 135; *Joines* v. *Patterson*, 274 U. S. 544, 549 (Pet. 41–43). Later, in *Carolene Products Co.* v. *United States*, 323 U. S. 18, 26, this Court noted that these cases "have established under suitable conditions" "the general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording." But this Court continued that "It is a presumption of legislative intention, however, which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention."

In the present case, the legislative history of the Smith Act contains no indication that Congress was aware of the California decisions relied upon by petitioners. More important, that history affirmatively shows that the draftsmen of the Smith Act were using as their principal model the 1902 New York criminal anarchy statute which was involved in *Gitlow* v. *New York*, 268 U. S.

652.[28] Since the "organize" clause of the New York statute[29] has never been given the narrow interpretation urged here by petitioners, there is no basis for presuming that Congress intended to adopt such a meaning by consciously modelling the Smith Act upon the New York statute. Ac-

[28] The Smith Act, Title 1 of the Alien Registration Act of June 28, 1940, 54 Stat. 671, was added on the floor of the House as an amendment by Congressman Smith. Mr. Smith stated that Congressman McCormack of Massachusetts was really the author of its language (84 Cong. Rec. 10452, cf. 85 Cong. Rec. 9032). By this, he meant that the language of the proposed amendment (*ibid.* 10451–10452) was the same as the language of H. R. 4313 introduced in 1935 in the 74th Congress. At that time, Mr. McCormack appeared before a House Judiciary Subcommittee in support of H. R. 4313, stating that the bill represented one of the recommendations of the Special (McCormack-Dickstein) Committee on Un-American Activities. In answer to a question as to whether the bill was drawn "along the same lines as the New York State statute", Mr. McCormack answered:

> Exactly; only in more simplified form. We have eliminated a number of elements which are contained in most State statutes.

(Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 74th Congress, 1st session, on H. R. 4313, May 22, 1935, Serial 5, p. 6). And in the discussion at the hearing, repeated reference was made to *Gitlow* v. *New York*, *supra*, a prosecution under the New York statute (*ibid.*, pp. 6–7, 107).

[29] It is Section 161 (4) of the New York Penal Law, as follows:

> Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

cordingly, the trial judge correctly attributed to "organize" a realistic meaning which carries out the purpose of Congress."[30]

7. *The denial of motions for continuance and mistrial.* Petitioners claim that they were deprived of a fair and impartial trial because of the denial of their motions for a continuance and for mistrial (Pet. 81).

Petitioners' motion for continuance was based on publication of a series of articles by Herbert Philbrick, a witness in the *Dennis* case, concerning his Communist Party activities, which were syndicated throughout the country and appeared in a Los Angeles newspaper at the time of the beginning of the trial. There was no mention of any of these petitioners in them, the closest connection being a reference to the "Notorious Communist 11" whose names are mentioned in the indictment, but whose identification could not be apparent to the jury. Nevertheless, on *voir dire,* the trial judge specifically asked the prospective jurors if they had read the articles, and determined that they had not (Tr. 61).

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[30] Webster's New International Dictionary (2d Ed.) defines "organize" as follows:

1. To furnish with organs; to give an organic structure to * * *. See organized.

2. To arrange or constitute in interdependent parts, each having a special function, act, office, or relation with respect to the whole; to systematize; to get into working order; as, to organize an army; to organize recruits.

Petitioners' motion for mistrial was based on the release on July 29, 1952, by the Senate Judiciary Subcommittee on Internal Security of a pamphlet, and its attendant publicity in the press, radio and television. This pamphlet, entitled *Documentary Proof That the Communist Party, U. S. A., Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence*, consists of a memorandum which the Director of the Federal Bureau of Investigation had previously, in June, 1952, delivered to the Senate Subcommittee *at its request*. The pamphlet consisted in large part of quotations from writings of Marx, Engels, Lenin and Stalin and from published comments on those writings by American Communist leaders, but did not mention any of these petitioners. While the facts above show to the contrary, petitioners alleged that "the prosecutor or its agents" publicly advised the jury on the eve of their deliberations of the contents of this report (Pet. 80).

At the time the matter was called to the attention of the trial judge, he offered to permit the defense to reopen argument to the jury; he also offered to make inquiry of the jury as to whether any of them had heard or read of the matter and, if so, whether any juror felt influenced by such extraneous publicity or felt unable for any reason to continue to sit with absolute impartiality and decide the case solely upon the evidence adduced in the courtroom. The trial judge pointed out

that there were four alternate jurors who had sat throughout the six months of the trial and who could be called upon to serve in the event any of the jurors might have felt the influence of any such publicity. 106 F. Supp., at 925.

The petitioners refused the court's offer, but requested that the jury be polled with a single question whether any of the jurors had heard or read of the report, it being their position that any further inquiry would be immaterial. Indeed, it is petitioners' contention here that "it is doubtful that any instructions under the circumstances could have saved the situation" (Pet. 80). The trial judge properly declined to limit the inquiry as the petitioners requested; and no mention of the matter was made in submitting the case to the jury, other than the caution that their verdict must be based solely upon the evidence in the case as adduced in the courtroom.

The single question of whether the jurors had heard of the report was not the critical test, but rather whether, if they had heard of it, they were influenced by it. We submit, with the court below (Pet. App. 38), that petitioners were clearly fencing when they rejected the court's offer to reopen closing arguments and to poll the jury as to whether they would be influenced by the report if they had, in fact, heard of it. Jurors' knowledge of publicity adverse to a defendant does not create any presumption of prejudice on the part

of the jury against the defendant. See *Holt* v. *United States*, 218 U. S. 245, 250–251; *Finnegan* v. *United States*, 204 F. 2d 105, 110 (C. A. 8); *United States* v. *Moran*, 194 F. 2d 623, 625 (C. A. 2), certiorari denied, 343 U. S. 965; *United States* v. *Kats*, 173 F. 2d 116, 117 (C. A. 3); *Shushan, et al.* v. *United States*, 117 F. 2d 110, 115–116 (C. A. 5), certiorari denied, 313 U. S. 475.

Similar motions have been made in substantially all Smith Act cases. Cf. *United States* v. *Dennis*, 183 F. 2d at 226. The same contention was made in *United States* v. *Flynn*, 216 F. 2d at 376, with respect to the release by the subcommittee of the pamphlet under consideration here (and which had mentioned by name two of the *Flynn* defendants).

Petitioners' argument is bottomed on the premise that all of the organs of Government which have a duty to publish facts affecting the public interest (particularly during such a period as the Communist aggression in Korea in 1952) must, nevertheless, become silent during their trial. The situation was totally unlike that in *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1), where a Congressional subcommittee held hearings in the city of trial concerning the precise issues upon which the defendant was tried. Cf. *Cramer* v. *United States*, 325 U. S. 1; *Stephan* v. *United States*, 133 F. 2d 87 (C. A. 6), certiorari denied, 318 U. S. 781.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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U. S. GOVERNMENT PRINTING OFFICE: 1955

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	5
The Government's evidence	9
1. The history and objectives of the Communist Party	9
2. The specific evidence showing the knowing participation of each individual petitioner in the conspiracy	11
Oleta O'Connor Yates	11
Henry Steinberg	19
Loretta Starvus Stack	22
Frank Efroim Spector	27
Albert Jason Lima	31
Carl Rude Lambert	33
Rose Chernin Kusnitz	37
Ernest Otto Fox	40
Ben Dobbs	43
Dorothy Healey Connelly (also known as Dorothy Healey)	50
Frank Carlson	53
William Schneiderman	58
Al Richmond	65
Philip Marshall Connelly	68
Summary of argument	70
Argument	78
I. The Smith Act as construed and applied in this case does not violate the First Amendment	79
A. The instructions to the jury correctly explained the meaning of "advocacy" of violence, and there was no need to give petitioners' requested instruction explaining that meaning in terms of "incitement" to violence—a term bearing an inappropriate connotation of immediacy	79
B. The "clear and present danger" test is satisfied	87

Argument—Continued Page

II. The trial judge correctly instructed the jury as to the meaning of "organize" as used in the Act and indictment 92
III. The evidence amply supports the verdict 104
IV. The commission of overt acts in furtherance of the conspiracy within the limitations period was adequately proved 115
V. Petitioners were not deprived of a fair trial by the trial judge's refusal to grant their motions for a continuance and for a mistrial 120
A. The judge appropriately exercised his discretion in declining to grant the motion for a continuance based on the publication of the "Philbrick articles" 120
B. The refusal to declare a mistrial on the basis of the publicity given to the release by a Senate Committee of an FBI memorandum purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the Government was a proper exercise of discretion in the circumstances of this case 123
VI. Petitioner Schneiderman's prosecution was not barred by this Court's 1943 decision setting aside his denaturalization 131
Conclusion 137
Appendix A: The history, aims, techniques, activities, and teachings of the Communist Party of the United States (including the California Party) 138
Origin and early history of the Party 138
The 1930's and the Young Communist League 139
The San Francisco General Strike of 1934 140
The "Communist Political Association" interlude of 1944–1945 144
The 1945 reconstitution of the Communist Party 145
The central importance of Marxism-Leninism in the reconstituted Party 147
Marxism-Leninism, as taught in Party schools—the necessity of force and violence in the "proletarian revolution" which is to eventuate in the "dictatorship of the proletariat" 149

Appendix A—Continued Page

The organizational structure of the Party and the maintenance of "iron discipline" through the principle of "democratic centralism" 164
The clandestine nature of the Party 170
The Party policy of concentrating its forces in "key" or "basic" industries 174

CITATIONS

Cases:

Abrams v. *United States*, 250 U. S. 616 88
Avery v. *Alabama*, 308 U. S. 444 121
Braverman v. *United States*, 317 U. S. 49 119
Carlson v. *Landon*, 342 U. S. 524 91
Carlson v. *Landon*, 187 F. 2d 991, affirmed, 342 U. S. 524 134
Carlson v. *United States*, 187 F. 2d 366, certiorari denied, 341 U. S. 940 119
Carolene Products Co. v. *United States*, 323 U. S. 18 100
Commissioner v. *Sunnen*, 333 U. S. 591 ..... 132, 136
Cramer v. *United States*, 325 U. S. 1 95
Delaney v. *United States*, 199 F. 2d 107 130
Dennis v. *United States*, 341 U. S. 494 ..... 9, 70, 71, 78, 79, 80, 83, 84, 85, 87, 88, 89, 90, 91, 92, 134
Dennis v. *United States*, 183 F. 2d 201, affirmed, 341 U. S. 494 90
Finnegan v. *United States*, 204 F. 2d 105, certiorari denied, 346 U. S. 821 ..... 122, 128
Frankfeld v. *United States*, 198 F. 2d 679, certiorari denied, 344 U. S. 922 ..... 9, 81
Galvan v. *Press*, 347 U. S. 522 91
Gitlow v. *New York*, 268 U. S. 652 ..... 83, 84, 100, 101
Glasser v. *United States*, 315 U. S. 60 ..... 105, 109
Haupt v. *United States*, 330 U. S. 631 95
Holt v. *United States*, 218 U. S. 245 ..... 122, 128
James v. *Appel*, 192 U. S. 129 100
Joines v. *Patterson*, 274 U. S. 544 100
Kawakita v. *United States*, 343 U. S. 717 119
Lewis v. *Frick*, 233 U. S. 291 136
On Lee v. *United States*, 343 U. S. 747 105
Opper v. *United States*, 348 U. S. 84 122
People v. *Thornton*, 63 Cal. App. 724 99
People v. *Thurman*, 62 Cal. App. 147 99

Cases—Continued Page

People v. *Ware*, 67 Cal. App. 81 99
Pierce v. *United States*, 252 U. S. 239 119
Schenck v. *United States*, 249 U. S. 47 88
Schneiderman v. *United States*, 320 U. S. 118 ..... 59, 60, 132, 133, 134, 135, 136
Sealfon v. *United States*, 332 U. S. 575 ..... 78, 136
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U. S. 574 128
Stromberg v. *California*, 283 U. S. 359 95
Terminiello v. *Chicago*, 337 U. S. 1 89
Todorow v. *United States*, 173 F. 2d 439, certiorari denied, 337 U. S. 925 95
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U. S. 909 ..... 9, 54, 71, 78, 90, 129
United States v. *Katz*, 173 F. 2d 116 128
United States v. *Lebron*, 222 F. 2d 531, certiorari denied, 350 U. S. 876 110
United States v. *Mesarosh*, 223 F. 2d 449, certiorari pending, No. 20 ..... 81, 109
United States v. *Moran*, 194 F. 2d 623, certiorari denied, 343 U. S. 965 128
United States v. *Rabinowich*, 238 U. S. 78 119
United States v. *Schneiderman*, 102 F. Supp. 87 ..... 6, 87
United States v. *Schneiderman*, 106 F. Supp. 906 ..... 85, 87, 88, 93, 94, 124, 127, 131
United States v. *Thompson*, 214 F. 2d 545, certiorari denied, 348 U. S. 841 173
United States v. *Williams*, 341 U. S. 58 136
Wellman v. *United States*, 227 F. 2d 757, petition for certiorari pending, No. 9, Misc. 98
Williams v. *North Carolina*, 317 U. S. 287 95
Willis v. *Eastern Trust & Banking Co.*, 169 U. S. 295 100
Yates v. *United States*, 227 F. 2d 851, certiorari pending, No. 15 19

Constitution:
First Amendment 70, 79, 84

Statutes:
Alien Registration Act of June 28, 1940, title I, 54 Stat. 671 101
California Criminal Syndicalism Act (Stats. 1919, c. 188; General Laws, Act 8428) 99, 100
Internal Security Act of 1950, § 2, 64 Stat. 987 91

Statutes—Continued

	Page
New York Criminal Anarchy Act (Laws 1902, c. 371; Penal Law, § 161)	100
Public Law 766, 84th Congress (July 24, 1956)	92, 115
Smith Act (Act of June 28, 1940, c. 439, title I, 54 Stat. 670, 671):	
§ 2 (18 U. S. C. [1946 ed.] 10)	4, 6, 98
§ 3 (18 U. S. C. [1946 ed.] 11)	5, 6
§ 5 (18 U. S. C. [1946 ed.] 13)	5
18 U. S. C. 371	4, 6, 92, 115
18 U. S. C. 2385	3, 4, 6, 92
Congressional Materials:	
84 Cong. Rec. 10451–10452	101
84 Cong. Rec. 10454	98
86 Cong. Rec. 9032	101
Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 74th Cong., 1st sess., on H. R. 4313 and H. R. 6427, May 22, 1935, Serial 5, p. 2	98, 101
Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 76th Cong., 1st sess., on H. R. 5138, April 12 and 13, 1939, Serial 3, pp. 83–85	101
H. R. 4313, 74th Cong., 1st sess	101
H. R. 5138, 76th Cong., 1st sess	101
H. R. 6427, 74th Cong., 1st sess	101
Miscellaneous:	
Century Dictionary and Cyclopedia (1911)	81
Encyclopedia Britannica, "Commune"	142
Funk & Wagnalls, *New Standard Dictionary* (1947)	81, 102
Funk & Wagnalls, *The New International Yearbook for 1934*, pp. 674–675	140
Murray, *New English Dictionary* (1901)	81
4 *New Larned History, The* (1923 ed.), pp. 3448–3449	142
Webster's *New International Dictionary*, 2d ed., unabridged	81, 82, 102

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 6

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY AND FRANK CARLSON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 7

WILLIAM SCHNEIDERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 8

AL RICHMOND AND PHILIP MARSHALL CONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 105–139)[1] is reported at 225 F. 2d 146. The opinions of the District Court are reported at 102 F. Supp. 87, 104 F. Supp. 405, 106 F. Supp. 731, 106 F. Supp. 892, and 106 F. Supp. 906.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1955 (R. 140). A petition for rehearing was denied on June 15, 1955 (R. 140). On June 27, 1955, Mr. Justice Frankfurter extended the time for filing petitions for writs of certiorari to August 13, 1955 (R. 141). The petitions for certiorari were filed on August 10, 1955, and were granted on October 17, 1955 (R. 141–142). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court, in explaining the meaning of "advocacy" of violence in its charge to the jury, properly refused to give an instruction which

[1] "R." will be used herein to refer to that portion of the record which was printed under the supervision of the Clerk of this Court following the issuance of the writs of certiorari. "A." will be used to refer to the selections from the record which were printed as an appendix (in two volumes) to the Government's brief in the Court of Appeals, now on file with this Court. "Tr." will be used, where necessary, to refer to the original transcript of record, which is also on file with this Court.

[2] The District Court opinions—except for the "Appendix" to the last-cited opinion, containing the instructions to the jury (106 F. Supp. at 927–941)—also appear as Appendix B to the petitions for certiorari.

would have explained that meaning in terms of "incitement" to violence, in view of the potentially misleading character of that term as suggesting the urging of immediate violence.

2. Whether the "clear and present danger" test is satisfied.

3. Whether the trial court correctly instructed the jury as to the meaning of "organize" as used in the Smith Act.

4. Whether the evidence is sufficient to support the convictions.

5. Whether the commission of overt acts in furtherance of the conspiracy within the limitations period was adequately proved.

6. Whether petitioners were deprived of a fair trial by the trial court's refusal to grant their motions for a continuance and for a mistrial.

7. Whether petitioner Schneiderman's prosecution was barred by this Court's 1943 decision setting aside his denaturalization.

STATUTES INVOLVED

18 U. S. C. 2385 provided in pertinent part at all times relevant hereto:[28a]

> Whoever knowingly or willfully advocates, abets, advises or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States * * * by force or violence * * *; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the

[28a] See fn. 110, *infra*, p. 92.

duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence * * *; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

18 U. S. C. 371 provides in pertinent part:

If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

Sections 2, 3, and 5 of the so-called Smith Act (the Act of June 28, 1940, c. 439, title I, 54 Stat. 670, 671, 18 U. S. C. [1946 ed.] 10, 11, and 13) provided in pertinent part (prior to their repeal and substantial reenactment in codified form as 18 U. S. C. 2385 and 371, *supra*[3]) as follows:

SEC. 2. (a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability,

[3] Effective as of September 1, 1948 (see 62 Stat. 862, 867).

or propriety of overthrowing or destroying any government in the United States by force or violence * * * ;

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

* * * * *

SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

* * * * *

SEC. 5. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

* * * * *

STATEMENT

On December 21, 1951, a single-count indictment (R. 1–6) was returned in the United States District Court for the Southern District of California charg-

ing the fourteen petitioners with having conspired to violate the Smith Act[4]—

> * * * by (1) wilfully and knowingly advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence, with the intent of causing the aforesaid overthrow and destruction * * * as speedily as circumstances would permit; and by (2) wilfully and knowingly organizing, and helping to organize, as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, with the intent of causing the aforesaid overthrow and destruction * * * as speedily as circumstances would permit (R. 2).[5]

A fifteenth defendant named in the indictment, Mary Bernadette Doyle (R. 2), was later granted a severance because of illness. The twelve national leaders of the Communist Party, the conviction of eleven of whom reached this Court in *Dennis* v. *United States,* 341 U. S. 494—William Z. Foster, Eugene Dennis, John B. Williamson, Jacob Stachel, Robert

[4] More precisely, it was charged that they conspired "to commit offenses against the United States prohibited by Section 2 of the Smith Act" and 18 U. S. C. 2385, in violation of § 3 of the Smith Act "while said section of said act remained effective," and thereafter in violation of 18 U. S. C. 371 (R. 2). See *supra*, pp. 3–5, including fn. 3.

[5] Two earlier indictments—one naming some of these petitioners as defendants and the other naming the remainder—had previously been dismissed for failure adequately to charge the intent required to be established under the statute. See *United States* v. *Schneiderman*, 102 F. Supp. 87.

G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall[6]—were named as "co-conspirators but not defendants herein" (R. 2). The conspiracy was alleged to have been continuously in effect from "on or about June 28, 1940"[7] to and including the date of the filing of the indictment (R. 1).

Paragraphs 2–8 of the indictment (R. 2–4) charged that it was part of the conspiracy that petitioners and their co-conspirators would become members, officers, and functionaries of the Communist Party, knowing its purposes, and in these capacities assume leadership in the Party and responsibility for carrying out its policies and activities (par. 2); that they would organize groups, clubs, sections, and other units of the Party and would recruit new members, concentrating on the recruitment of persons employed in "key" and "basic" industries (par. 3); that they would publish and circulate books, articles, and newspapers teaching and advocating the duty and necessity of overthrowing the Government of the United States by force and violence as speedily as circumstances would permit (par. 4); that they would write and cause to be written articles and directives in Party publications (par. 5); that they would conduct and cause to be conducted schools and classes in which Party recruits and members would be in-

[6] The twelfth defendant, Foster, was granted a severance for reasons of health, and has not yet been tried.

[7] June 28, 1940, was the date of the enactment of the Smith Act (see *supra*, p. 4).

doctrinated in the principles of "Marxism-Leninism" and in which the duty and necessity of overthrowing the Government of the United States by force and violence as speedily as circumstances would permit would be taught and advocated (par. 6); that they would cause vital parts of the Party to "go underground" "in the event of emergency" and there continue the conspiracy (par. 7); and that they would use false names and documents in order to conceal their identities and activities as Party members and functionaries (par. 8).

Twenty-three overt acts in furtherance of the conspiracy and to effect its objects were alleged (R. 4–6).

Following a trial by jury, petitioners were found guilty (R. 96) and each was sentenced to imprisonment for five years and to pay a fine of $10,000 (R. 103).*

The Government's evidence consisted of the testimony of 22 witnesses, all former members of the Communist Party (including persons who had joined the Party as confidential informants of the Federal Bureau of Investigation), and documentary evidence consisting of books, articles, study-outlines, etc., which set forth the teachings, tenets, and program of action of the Party. Ten of the 14 petitioners—all except Yates, Stack, Carlson, and Schneiderman—rested their cases without putting in any evidence (Tr.

* The trial lasted just under six months, from February 5 to July 31, 1952 (Tr. 236, 13838). The jury reached their verdicts on August 5, 1952, following five days of deliberation (R. 96; Tr. 13865–13873).

10074–10075). The defense of Stack, Carlson, and Schneiderman consisted of brief testimony by two witnesses (Tr. 10752–10780, 10809–10815, 11579–11589), a deposition (Tr. 12108–12135), and a number of exhibits. Petitioner Yates alone testified in her own behalf, she refusing in numerous instances (see *infra*, p. 19, and fn. 17) to answer questions put to her on cross-examination (A. 377–445; Tr. 10159–11885).[9]

On appeal to the Court of Appeals for the Ninth Circuit, the judgments of conviction were affirmed (R. 140).

THE GOVERNMENT'S EVIDENCE

1. *The history and objectives of the Communist Party*

As in the other Communist Smith Act cases which have reached this Court (*Dennis* v. *United States*, 341 U. S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922; *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909), the Government introduced voluminous evidence that the Communist Party is a group which advocates the overthrow of the Government by force and violence. In Appendix A, *infra*, pp. 138–147, we set forth in some detail the evidence relating to the origin and the early and recent history of the Party in the United States, including the period of the 1930's and the Young Communist League, the

[9] The Court of Appeals observed in its opinion that "it must be borne in mind that the jury weighed evidence which was in essentials uncontradicted" (R. 125).

San Francisco general strike of 1934, the "Communist Political Association" interlude of 1944–1945, and the reconstitution of the Communist Party in 1945. We also discuss (*infra, pp.* 147–164) the central role of "Marxism-Leninism" in the reconstituted Party and document the fact that force and violence is the fundamental theme in the teachings of Marxism-Leninism.

Appendix A also summarizes (*infra,* pp. 164–170) the evidence as to the organizational structure of the Party and the maintenance of "iron discipline" through the Party principle of "democratic centralism", with particular reference to California (the seat of petitioners' activities). There is likewise collected (*infra,* pp. 170–177) the evidence on the intrinsically clandestine nature of the Party, and its consistent policy of concentrating its forces in "key" or "basic" industries.

This material is, in general, well known to the Court and for that reason we do not collate it in this Statement. But we may point out that the evidence specifically relating to the 14 petitioners can be properly appraised and evaluated only in the light of the mass of evidence as to the history, aims, techniques, activities, and teachings of the Communist Party as a whole. In this connection, we emphasize that, as Appendix A shows in detail, the California branch of the Party, in which petitioners were active, marched right in step with the rest of the Party in this country. See, *e. g.,* Appendix A, *infra,* pp. 139–143, 146, 148, 149–164, 169–170, 173–174, 176.

2. *The specific evidence showing the knowing participation of each individual petitioner in the conspiracy*

What follows is a summary of the specific evidence applicable to each petitioner individually, showing the particular positions of leadership in the Party he or she has held and other grounds giving rise to the legitimate inference that he or she had knowledge of the nature and character of the Party as an organization which advocates and teaches the duty and necessity of overthrowing the Government of the United States by force and violence, together with the intent of causing such overthrow as speedily as circumstances would permit.[10]

Oleta O'Connor Yates.—Petitioner Yates, a former alternate member of the Party's National Committee (Ex. 415, p. 2. [A. 131–132][10a]), has been, since 1950, State Organizational Secretary of the California Party (A. 393), the second highest office in the State organization [11] (A. 6).

During the period 1936–37 (A. 7–8; Tr. 434–437), Yates, a Party member since 1933 (Tr. 10250), in addition to being a delegate to the Party's 1936 National Convention (A. 7), held at various times the Party positions of "educational director" for San Francisco County (*ibid.*), San Francisco "county organizer" (*ibid.*), and member of the governing "District Committee" for "District 13" (A. 8), which formerly in-

[10] Since a specific item of evidence may directly concern two or more petitioners, a certain amount of duplication has been unavoidable, but we have attempted to keep this to a minimum.

[10a] See fn. 1, *infra*, p. 138.

[11] The highest being that of State Chairman, the position occupied by petitioner Schneiderman (see *infra*, p. 60).

cluded all of California as well as several other western states. She was also during this period an instructor at a "state leadership school" conducted by the California State organization (A. 8, 248–249; Tr. 523).

In her lectures at the "leadership school" just referred to, Yates "used as a textbook" (A. 249) the work by "J. Peters" entitled *The Communist Party, a Manual on Organization* (Ex. 61). In a preface to this work (*id.*, pp. 3–7 [Tr. 524–532]) by alleged co-conspirator Jack Stachel, a *Dennis* defendant, Stachel praised it as "embod[ying] * * * the best that is available in the theory and practice of organization in our own Party and the Communist International" and as providing the Party with a "weapon" which "fills a long-felt need" (*id.*, p. 3 [Tr. 525–526]).

"The * * * Aim" of "the Communist Party of the U. S. A.", states the *Manual*, is "the revolutionary overthrow of capitalism", "the establishment of the dictatorship of the proletariat", and "the establishment of a Socialist Soviet Republic in the United States" (*id.*, p. 8 [Tr. 536]). In "the fight" to achieve these objectives, it declares, "[t]he Communist Party is the organized vanguard of the working class,"—"the general staff of the proletariat" (*ibid.* [Tr. 535–536]). One of "the conditions" which must be fulfilled before the "outworn capitalist system [of the United States] can be overthrown", continues the *Manual*, is that "a majority of the class-conscious, thinking, politically active workers" should (*id.*, p. 9 [Tr. 537], quoting Lenin)—

> * * * fully understand the necessity for revolution and be ready to sacrifice their lives for it * * *.

And a second condition is the occurrence of some "governmental crisis" which so "weakens the government" as to make it "possible for the revolutionaries to overthrow it rapidly" (*ibid.*).

"The Soviet Union is the only fatherland of workers all over the world", continues this textbook used by Yates in her lectures (*id.*, p. 16 [Tr. 538]). For this reason, "[t]he Communist Party rallies the masses * * * for the defense of the Soviet Union", and workers the world over "must defend [the Soviet Union] with all their power" (*id.*, pp. 16–17 [Tr. 538]). The *Manual* explains what "the basic industries" are and why it is "of the utmost importance" that the Party "concentrate * * * its forces" in them (*id.*, pp. 47–48 [Tr. 539–540]).[12] It tells "How to Build Shop Units", points out that "the factory" is [t]he stronghold, the fortress of the revolutionary movement", and explains that the "main difference between the Communist Party and the Socialist Party" is that "Socialist Party organizations * * * are built on the basis of bourgeois election wards and districts" (*id.*, p. 48 [Tr. 541]). Defining a "professional revolutionist" as "a highly developed comrade, trained in revolutionary theory and practice", "steeled" and "stable", it declares that

[12] For further details concerning the Party's policy of concentrating its forces in the "basic industries", which the *Manual* defines as "those upon which the whole economic system depends" (Ex. 61, p. 47 [Tr. 539]), see Appendix A, *infra*, pp. 174–177.

it is the "task" of the Party "to make every Party member a professional revolutionist" (*id.*, pp. 112–113 [Tr. 543–544]).

In 1944, Yates was elected as an alternate member of the National Committee of the Party (Ex. 415, p. 2 [A. 131–132]), as well as a regular member of its California State Committee (Ex. 415, p. 3 [A. 126–127]), in addition to being Chairman of its San Francisco County branch (A. 378).

From 1944 to June 1948 (A. 363, 364), witness Daisy Van Dorn was superintendent of the building in San Francisco in which the Communist Party maintained its State and County headquarters, these headquarters being on the seventh floor of the building. (A. 358). In or about November 1944, petitioner Schneiderman asked Mrs. Van Dorn if it would be "possible for the elevator to run evenings" as "he would like to hold a State board meeting" in the seventh-floor offices (*ibid.*). Mrs. Van Dorn, after securing the permission of the owner of the building, agreed with Schneiderman to "run the elevator" herself (A. 358–359). Later in the same week, petitioner Yates similarly requested Mrs. Van Dorn to run the elevator on certain evenings "for her", as she desired to hold night meetings of her "County Board" from time to time (A. 360). Mrs. Van Dorn likewise agreed to accommodate Yates (*ibid.*). Thereafter, until she quit her job in June 1948 (A. 364), Mrs. Van Dorn used to run the elevator "three and four nights a week, sometimes five", transporting persons to and from the seventh floor of the building (A. 359, 361, 366, 367–368, 373, 375). Before Mrs. Van Dorn would

take anyone into the elevator on these occasions, she would make sure that the person's name was on a "list of names" which either Schneiderman or petitioner Lambert, the security chief of the State Party (see *infra*, pp. 33–34), used to supply her (A. 366–367), and she "had to check these people off as [she] allowed them in the elevator" (A. 367).[13] Among the persons whom she used thus to take up in the elevator over this three-and-a-half-year period, in addition to Yates and Schneiderman themselves, were petitioners Lambert (A. 359, 360, 366–367), Fox (A. 366), Dobbs (A. 359), Healey[14] (A. 374–375), Carlson (A. 359, 361), Richmond (A. 367–368), and Connelly (A. 372–374).

Mrs. Van Dorn further testified that, during some or all of this period from November 1944 to June 1948, petitioners Yates, Stack, Lima, Lambert, Carlson, and Schneiderman "had offices" in these seventh-floor headquarters (A. 362–365). And on at least one occasion during this period, in February 1945, Yates taught a class "in Marxism"[15] in these headquarters (A. 368–369).

In April 1945, Yates attended a reception in honor of old-time Party member "Mother" Bloor (A. 369).

[13] During the last three years of her employment in the building, Mrs. Van Dorn herself was a Party member, on a confidential-informant basis (A. 357–358).

[14] Petitioner Dorothy Healey Connelly was referred to throughout the trial as Dorothy Healey, and we shall follow that practice.

[15] Yates testified that "Marxism" and "Marxism-Leninism" have "the same meaning", the latter being a "continuation of" the former "after the death of Marx" (A. 378). For its relevant principles and precepts, see Appendix A, *infra*, pp. 149–164.

The reception was a private affair held at a private home and attended by "not over 50" specially selected Party members, among whom, in addition to Yates, were petitioners Lambert and Schneiderman (A. 369–371). "Mother" Bloor told those present that "the day of the revolution was nigh" and that the "arms" were in readiness (A. 372). Though she was "83 years old", she said, she hoped to "live to see this bloody battle through" (A. 371). She predicted that it would be "a wonderful revolution", with "blood flowing in the streets" (*ibid.*). She urged her listeners to be "good Red Bolshevik[s]" (A. 372) and to "[w]in this country for us" (A. 371). After the reception, when witness Van Dorn, who was one of the guests, told Yates how much she had enjoyed it, Yates, pointing out that "very few were included in that reception", cautioned her to "be quiet about it," to "[k]eep everything to [her]self" (*ibid.*).

In 1946, Yates, in collaboration with petitioner Carlson (A. 387–388), prepared a booklet entitled *A Handbook for Club Officers.* (Ex. MF) (see fn. 123, *infra,* p. 113). Also during 1946 she played a prominent role in the expulsion proceedings against the "left sectarian dissidents" in the California Party (see Appendix A, *infra,* pp. 169–170), these proceedings including the meeting at which (see fn. 49, *infra,* p. 170) petitioner Fox, vehemently denying the chiding remark of member Rosenbaum that the Party was "not a revolutionary party", declared that it "was a revolutionary party" but that the "time * * * for militant action * * * had not arrived yet" (A. 150). (See also *infra,* p. 41).

In November or December 1946, Yates was a speaker at a Party meeting at which petitioners Steinberg, Spector, Kusnitz, Dobbs, and Healey were also present (A. 135–136). She "spoke on the Soviet power, its influence in Burma, in China, Yugoslavia, Czecho-Slovakia, Bulgaria, France, [and] Italy" (A. 136). "[I]t is only through the support of the Soviet [Union]", she said, that it is "possible for Marxism to work and guarantee [a Soviet] type of government," and it is "only through Marxist-Leninist training" that this will be "possible all over the world" (*ibid.*).

In December 1946, Yates contributed an article on *The Struggle Against Deviations and Factionalism in San Francisco* (Ex. 639, pp. 1092–1103 [see A. 157–158, 597–598]) to *Political Affairs,* the Party's official theoretical organ (A. 408). In the article she severely criticized "left sectarianism", despite the "revolutionary phrases" with which it "cloaks itself," because of their unrealizability under "existing conditions" (Ex. 639, p. 1093).

In February 1947, Yates was present, together with petitioners Lima and Lambert, at a Party meeting at which petitioner Schneiderman, criticizing "left sectarians" for being "like the horse that was too far ahead of the cart", assured those present that the Party was "still" a Party of "revolution", but pointed out that, since "revolution means tragedy, * * * violence and bloodshed, * * * sacrifices, the loss of property, the loss * * * of relatives, the loss of our own lives", it was not a thing lightly to be undertaken—"something you can just shrug off or laugh off" (A.

146–147). On the contrary, said Schneiderman, "revolution is serious business," demanding careful preparatory work "among labor, farmers, and minority groups" so as to insure its success when the time to launch it arrives (*ibid.*).[16]

In April 1947, Yates "chaired" a meeting of San Francisco Party club chairmen who "were concentrating on transportation" (Tr. 5458–5459). Between December 1947 and May 1949 (A. 225, 229), in company with petitioners Stack, Lima, Lambert, Fox, Healey, Schneiderman, and Richmond (A. 226–227, 230–231), she attended "[a]t least two dozen" (A. 229) "very secret meetings" (A. 232; see also A. 224–225, 232–233) of the Party's California State Board and San Francisco County Board (A. 225, 228) at the home of witness Bessie Honig in San Francisco (A. 224–234). In the spring of 1949, in her capacity as San Francisco County Chairman, she "open[ed] the press fund drive" for the Party's West Coast newspaper, the *Daily People's World* (A. 235; Tr. 5460–5461).

Also in 1949, in collaboration with petitioner Schneiderman (A. 397), Yates prepared one of the "study outlines" (Ex. 163) used in the "Marxist Institutes" conducted by the Party in California during 1949 and 1950. (See Appendix A, *infra*, pp. 150, 161–164.) These study outlines presented the Marxist-Leninist "classics," including many references to violent revolution. *The Party Review*, a "Preconvention Discussion Bulletin" circulated by the California

[16] For further details of this speech of Schneiderman's, see *infra*, pp. 64–65.

Party in 1950 (Ex. 181 [see A. 579]), announced that the State Committee had "set up a special committee" composed of Yates, petitioner Richmond, and one other "to help develop the pre-convention discussion" (*id.*, p. 1).

As of the time of the trial, Yates, in addition to being a member of the California State Committee (A. 418), occupied the second position in the California organization (see *supra*, p. 11). The only one of the defendants to take the witness stand (A. 377–445), she refused to submit to effective cross-examination by declining to answer many pertinent questions relating to the charges of the indictment (e. g., A. 416, 417, 418, 419, 420).[17]

Henry Steinberg.—Petitioner Steinberg, who in recent years has been active as a Party "educational director" (A. 138–139) and "practical politician" (A. 248), has been associated with the Party since at least as early as 1936, when witness Rosser met him in company with petitioners Dobbs and Carlson at a meeting of the Los Angeles leaders of the Young Communist League, the Party's youth unit (A. 247). See Appendix A, *infra*, pp. 139–140. This witness again met Steinberg at a "county committee meeting" of the Los Angeles County Communist Party held in June or July of 1940 (A. 247). The purpose of this meeting, which was also attended by petitioner Connelly (*ibid.*), was to discuss the Party's campaign

[17] For these refusals, she was held guilty of and sentenced for contempt of court. See *Yates* v. *United States*, 227 F. 2d 851 (C. A. 9), pending on certiorari, No. 15, and being argued as a companion case.

strategy in the forthcoming Presidential election (A. 248). Among the topics discussed were "the slogans" which the Party was to use in the campaign, including the slogan "Don't support the imperialist war; vote Communist" (*ibid.*).[18] In the ensuing election Steinberg was the Party's nominee for the office of State Assemblyman (Ex. 516 [A. 454]; Ex. 557 [A. 458]).

In November 1942, Steinberg attended a meeting of the Party's Los Angeles County Committee at which various decisions were taken with respect to the Party's training schools in that county (A. 256–257). The Committee heard a report from the "head of the schools" on such questions as who was to teach "Leninism No. 1", who "was going to handle Leninism 2,"[19] who "was going to lecture on the * * *

[18] From August 1939 to June 1941, the period of the German-Soviet Non-Aggression Pact, World War II was characterized by the Party as an "imperialist" and hence as an "unjust" war (A. 274, 275, 495, 572, 592, 594, 602). "Imperialist" wars, according to Communist teaching, should be turned into "civil" wars, having as their objective "the defeat of one's own government" (A. 494). When, however, the Soviet Union was invaded by Germany in June 1941, "the character of the war changed" (A. 274, 256). It suddenly became "a just war", "a war against fascism" (A. 274). And the Party's National Committee, following a hastily convened "Plenary Meeting", issued an urgent "Manifesto" calling on "the people of the United States" to support the "glorious and mighty defense by the Red Army" and the "valiant struggle" of the "peoples of the Soviet Union" to "crush the aggressor" and "assure the complete and final annihilation of Hitler and Hitlerism" (A. 255–256).

[19] "Leninism", like "Marxism", is a shortened form of "Marxism-Leninism." (see A. 378). For its pertinent teachings, see Appendix A, *infra*, pp. 149–164.

war against fascism, and so forth" (A. 257). Later in the meeting the Committee members discussed the question of which students should "go to the school", it being the Committee's responsibility to decide which of the local Party members "active in [Party] leadership" should attend "this basic training school" (A. 257–258).

By December 1946 or January 1947 Steinberg himself had advanced to the position of Party "educational director" for Los Angeles County (A. 138–139).[20]

In November or December 1946, Steinberg was present, together with petitioners Yates, Spector, Kusnitz, Dobbs, and Healey, at the previously-mentioned (see *supra*, p. 17) Party meeting at which Yates "spoke on the Soviet power" and described what would be needed to achieve a "Soviet * * * type of government" "all over the world" (A. 135–136).

In January 1949, Steinberg was Chairman of, and "made several speeches" at, a "Lenin Memorial Meeting" sponsored by the Party's "Education Department" for Los Angeles County honoring the "25th anniversary of the death of V. I. Lenin, chief founder of the Soviet Union" (A. 207–210; Ex. 737). The principal speaker at this "Lenin Rally", which was intended to "serve primarily as a protest against" the then-pending *Dennis* trial (Ex. 737 [A. 209]), was petitioner Dobbs (A. 210–211).

[20] For a summary of pertinent teachings of the Party in its California schools during this period, see Appendix A, *infra*, pp. 151–161.

In May 1949, Steinberg accompanied petitioner Schneiderman, the Party's State head (see *infra*, p. 60), on a trip to San Diego (A. 30), where Schneiderman "made a talk on behalf of" the Party's twelve indicted leaders (A. 29). In the spring of 1950, he was present with petitioner Healey among others at a "circulation drive" for the *Daily People's World* (A. 95–96), the Party's West Coast newspaper (see *infra*, pp. 110–112). In May 1950, he was advertised as a speaker at a May Day "mass meeting" sponsored by the Los Angeles Party's "Educational Committee" (Ex. 358; Tr. 2828). And in the summer of 1950, while running for election to the Los Angeles "Board of Education" (A. 99), he attended and spoke at a "closed" Party meeting admittance to which required that one "face a panel" (A. 98).[21]

Loretta Starvus Stack.—Petitioner Stack, an active Communist since the early 1930's (A. 213–215) and in recent years a member of the California State Committee (A. 418), has long been one of the top-echelon leaders in the State organization. Prior to petitioner Yates' succession to the office in 1950 (A. 114, 393), she occupied the California Party's second-ranking position (A. 6)—that of State Organizational Secretary (A. 106, 238; Ex. 315, p. 1).

[21] In October 1950, the Los Angeles Party sponsored an "election rally" at which Steinberg was a principal speaker (Ex. 359; Tr. 2844–2847). While the record does not reflect what he said in his speech, the tone of the rally may be inferred from the printed leaflets advertising it. They charged among other things that "profit-mad warmongers" in the United States were thwarting the Soviet Union's great desire for peace, and that the policies of the "Warren-Nixon-Gianinni gang" were open[ly] pro-fascist" (Ex. 359).

Stack, at that time known as "Lottie Keith" (A. 213–214), was one of a group of Young Communist League members who attended the "International Lenin School" in Moscow in 1932 (A. 214–216). Prior to their departure for the Soviet Union, she and her fellow students received instructions, with respect to their forthcoming trip, from witness Patterson at the League's national headquarters in New York (A. 215).[22] Patterson, at the time a self-described "professional revolutionist" (A. 220) who had just returned from Russia himself on a similar mission (A. 216–218), spoke to the group on behalf of the League's National Committee after being introduced by alleged co-conspirator Gilbert Green, the League's Secretary (A. 215) and more recently a defendant in the *Dennis* trial.

In 1934, following her return to this country, Stack related to Patterson some of the things she had been taught at the Lenin School (A. 215–216).[23] Among other things, she said, she had been instructed in the art of waging a successful revolution; this included instructions in such subjects as the use of the bayonet (A. 223) and various techniques of "street fighting" (A. 216). In "street fighting", she was taught, anything that could serve to "protect the revolutionaries in their fighting", such as "automobiles", "street-

[22] The evidence relating to this briefing session was offered by the prosecution only as against Stack (Tr. 5360).

[23] This conversation, which likewise (see fn. 22) was offered in evidence only as against Stack (Tr. 5366), took place in Philadelphia at the local district office of the Young Communist League (A. 216), of which Stack was at the time a member of the District Committee (Tr. 5386).

cars", "buses", and the like, were to be used as "barricades," and the revolutionists were to "disregard human life or anything else" in achieving their objective (A. 216–217). She was further taught that the Party in "the United States" should "try to stay legal as long as [it] could", but that in the event of "an attempt on the part of the American Government to drive the party underground" it would be "the duty of the students" to "prepare the party apparatus * * * for illegal work" in order that it might remain "intact * * * and function right along" (A. 217). She "had learned a lot from that teaching", she told Patterson, and she believed it desirable that the Party take immediate steps to "put this into practice" (A. 218). In her "class on the dictatorship of the proletariat", she said, she was taught that (A. 218–219)—

> * * * the dictatorship of the proletariat could only * * * come about as a result of the overthrow of the Government in the respective countries; and that it was the duty of the students of their respective countries to work to overthrow their own government and to set up the dictatorship of the proletariat as a guarantee that the government that was overthrown would not regain its power.[24]

Some time following this conversation Stack became active in Party circles in the California area. Between 1936 and 1949, witness Lautner saw her "many

[24] *Cf.* the Party's teachings in its post-World War II schools and classes in California concerning the nature of the "dictatorship of the proletariat" and its proposed function in this country (Appendix A, *infra*, pp. 151–154, 155–157).

times at plenums"—*i. e.*, plenary sessions (A. 43)—of the Party's National Committee (A. 72). In 1945, she was a member of the California delegation to the National Convention which reconstituted the Party following the interlude of the "Communist Political Association" (A. 72–73) (see Appendix A, *infra*, pp. 145–147), and in August of that year she was elected at the Party's California State Convention to membership on the State Board (A. 124–125, 130; Ex. 398). In her speech accepting this position she urged that "Marxist-Leninist rules" be "reinstitute[d]," and she predicted that "the American workers [would] be the grave diggers of the capitalistic government"[25] (A. 130).

From the end of 1945 until at least as recently as May 1948, when she became ill, Stack, together with petitioners Yates, Lima, Lambert, Carlson, and Schneiderman, "ha[d] a desk" at the Party's State headquarters in San Francisco (A. 362–365). At a 1946 Party convention, she made a speech in which she said that "we"—referring to the Party (A. 29–30)—

> * * * are the instrument through which this capitalist government will be overthrown * * * and a socialist form set up.

By the spring of 1947 she had advanced to the California Party's second highest office (A. 6)—that of State Organizational Secretary (A. 238). Between

[25] *Cf.* the passage in the *Communist Manifesto* to the effect that "What the bourgeoisie therefore produces, above all, are its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable" (Ex. 39, p. 21).

December 1947 and May 1949 (A. 225, 229), she was a regular attendant, together with petitioners Yates, Lima, Lambert, Fox, Healey, Schneiderman, and Richmond (A. 226–227, 230–231), at "[a]t least two dozen" (A. 225, 229) "very secret meetings" (A. 232; see also A. 224–225, 231–233) of the Party's California State Board and San Francisco County Board (A. 225, 228) held at the home of witness Bessie Honig in San Francisco (A. 224–234). In August 1948, she contributed an article entitled *Major Problems in Party Building* to the California Party's *State Convention Report* (Ex. 186 [see A. 580–581], p. 3). In her article, after referring to the fact that the Party had been "reconstitute[d]" from its "revisionist period" to the Marxist-Leninist concept of a Party which would "function as the vanguard of the working class",[26] she urged renewed emphasis on the Party's "industrial concentration policy" as a prerequisite to the achievement of its "political objectives" (*ibid.*).[27]

In October 1948, as State Organizational Secretary, she spoke to a group of Party members on the Party role of "the women" (A. 105–107, 118–119). The Party, she said, should occupy the place of "highest * * * importance in a person's life" (A. 106–107). In this connection she (A. 118)—

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[26] For the nature of the enterprise in which the Communist Party is to be, in Marxist-Leninist parlance, the "vanguard of the working class", see *supra*, p. 12, and Appendix A, *infra*, pp. 155–158.

[27] For details concerning the Party's policy of concentrating its forces in the so-called "key" or "basic" industries, the nature of such industries, and the reasons for the policy, see Appendix A, *infra*, pp. 174–177.

> * * * made reference to the historic role that the women played in bringing about the Russian revolution, and she made mention of the fact that women of today * * * must take the same historic role * * * in bringing about * * * this revolution, the overthrowing of the present existing economic system, not in part, but in its entirety.

"[T]o reach our aim", she said, it would be necessary for women to "take up * * * arms side by side with men" (A. 119).

Frank Efroim Spector:—Petitioner Spector, a "[p]ioneer [l]eader of the Communist Party in Los Angeles",[28] has been an active member of the Party, principally in the California area, since the early 1930's (A. 243–244; Tr. 7685–7688), his activities including that of Party "organizer" at various levels (A. 12, 293) and teacher of Marxism-Leninism in Party schools (A. 297, 307–308). As of May 1950, he was the Division Organizer of the Southern Division of Los Angeles County (A. 292–293).

In 1936, Spector used to attend, together with petitioners Lambert, Dobbs, Healey, Carlson, and Schneiderman, "underground meetings", held in "trusted members' homes", of the Los Angeles County Committee of the Young Communist League (A. 262–264). These meetings were, as witness Rosser put it, "so hid that you couldn't get to them unless you were invited and taken there", the reason for these precau-

[28] Spector was so described in *Two Decades of Progress, 1919–1939* (Ex. 611 [at p. 16]), a publication put out in 1939 by the Los Angeles Party.

tions being that the League "was a secret organization underground conspiring at that time" (A. 264).[29] Also in or about 1936, Spector became the Party's "county organizer" for San Francisco County (A. 12), and in 1937 (Tr. 447, 451) he was present at a "District 13" (see *supra,* pp. 11–12; Appendix A, *infra,* p. 165) Committee meeting at which Party leader Schneiderman sought to determine how a certain "Trotskyite article" had managed to get "past the party members" on the staff of the *Western Worker* (see *infra,* pp. 110–112) and find its way "into the pages of the party press" (Tr. 450). In 1940 or 1941, following a decision by the Party's National Committee that non-citizens were not to be permitted to remain in the Party at that time (A. 45; Tr. 2039–2042), Spector, a non-citizen, stated that as "a proletarian" he would "fight for his right to remain a member of the Communist Party" (A. 45–46).

In November or December 1946, Spector was among those present—others including petitioners Steinberg, Kusnitz, Dobbs, and Healey—at the previously-mentioned (see *supra,* p. 17) speech of petitioner Yates concerning the necessity of "Soviet * * * support" and "Marxist-Leninist training" as means to the bringing about of the "Soviet * * * type of government" "all over the world" (A. 135–136).

In December 1946, Spector "conducted classes" for Party members in Hollywood, California (A. 307).

[29] Rosser further testified that it was at meetings such as these, as distinguished from open meetings, held "in a big hall", that "the strategy and tactics of the party" were "worked out" (A. 263).

Among the books which he used in his lectures was Stalin's *Foundations of Leninism* (Ex. 1) (A. 307–308). Witness Russell, at that time a club "educational director" (A. 312), was one of Spector's pupils (A. 307). Russell recalled particular passages from this Marxist-Leninist classic to which Spector had directed his pupils' attention (Tr. 6867, 6869). In one of these, Stalin defines "Leninism" as (Ex. 1, p. 10 [Tr. 6870])—

> * * * the theory and tactics of the proletarian revolution in general, the theory and tactics of the dictatorship of the proletariat in particular.[30]

In another, Stalin explains why "the revolution in Russia could not but * * * assume an international character" (Ex. 1, p. 17 [Tr. 6883]). "[T]he whole situation", says Stalin, "impelled" the successful Russian revolutionists (*id.*, pp. 17–18 [Tr. 6884])—

> * * * to transfer the struggle to the international arena, * * * and to forge a new fighting weapon for the proletariat * * * [in its] task of overthrowing capitalism * * * [in] all countries.

Spector also required his students to read chapter VIII of this same work of Stalin's, entitled "The Party" (*id.*, pp. 107–124), in its entirety (A. 307–308). In that chapter the author refers with withering contempt to Kautsky's defense of the so-called

[30] *Cf.* the treatment of these subjects in the study-outlines used as guides for the teacher in the Party's state-wide schools and classes which it conducted during this period (Appendix A, *infra*, pp. 151–161).

"Second International" (Ex. 1, p. 107). "Kautsky says that the parties of the Second International are instruments of peace and not of war", observes Stalin, "and that for this very reason they were powerless to take any important steps * * * during the period of revolutionary action by the proletariat" (*ibid.*). "[Q]uite true", agrees Stalin, but all that Kautsky has succeeded in proving by this statement, he says, is that (*ibid.*)—

> * * * the parties of the Second International are unfit for the revolutionary struggle of the proletariat, that they are not militant parties * * * but election machines adapted for parliamentary elections and parliamentary struggle.

Some nine months later, in September 1947, Spector's pupil Russell was suspected by the Party of being a "police spy", and Spector was one of a group of three Party officials who interrogated him about the matter (A. 310–312). Spector asked Russell in the course of his cross-examination "what Marxist reading [he] had done" (A. 311). When Russell replied (*ibid.*) that he had read the *Communist Manifesto* of Marx and Engels (Ex. 39); two other works by Marx; Stalin's *Foundations of Leninism* (Ex. 1) and *Mastering Bolshevism*, and "the first half of" the *History of the Communist Party of the Soviet Union* (Ex. 28), Spector remarked that this was "a remarkably small amount of reading for the educational director of a club" to have done, that "a person in a

position of such responsibility ought to be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members"[31] (A. 312).

In May or June 1949, the regular instructor at a Party "leadership training school" announced to the class at one of its sessions that Spector was to be their instructor at the next session, that his "topic" was to be "the state", and that the class was "sure fortunate in having an instructor so well informed on this topic" (A. 297).[32]

Albert Jason Lima.—Petitioner Lima has in recent years been one of the top officials of the Communist Party of California, having served, contemporaneously with such other Party leaders as petitioner Schneiderman (the ranking California official) and most of the defendants in the *Dennis* case, on the Party's National Committee (Ex. 650 [A. 598]; Exs. 407, EA). Active in the California area since at least 1940 (Ex. 544 [A. 455]; Ex. 520 [A. 458]; Ex. 528 [A. 452]), he has held, at various times between 1946 and the trial of this case, in addition to his membership on the National Committee, such offices as Chairman of the Party's "East Bay Region", consisting of Contra Costa and Alameda Counties (A. 109–110), "Secretary" (Exs. 561 and 569 [A. 447]) and "Field

[31] For pertinent selections from some of these "basic works of Marxism-Leninism", with which it is reasonable to infer from this remark of Spector's that he was familiar, see Appendix A, *infra*, pp. 151–163.

[32] For a summary of the teachings of Marxism-Leninism on "the state", see Appendix A, *infra*, pp. 151–154.

Organizer"[33] of the California Party (Ex. 315, p. 1; A. 12), and "Assistant State Organizational Secretary"[34] (Ex. EA).

From the end of 1945 to at least as recently as June 1948, Lima, together with petitioners Yates, Stack, Lambert, Carlson, and Schneiderman, "ha[d] a desk" at the California Party's San Francisco headquarters (A. 362–365). In May or June 1946, he participated, together with petitioners Yates, Lambert, and Schneiderman, in the already referred-to (see *supra*, p. 16, and Appendix A, *infra*, pp. 169–170) expulsion proceedings against the Party's "left sectarian dissidents" accused of "anti-Party activity" for failing to follow the Party line with respect to the 1945–46 "machinist strike" (A. 151–153). In February 1947, he was present, together with petitioners Yates and Lambert, at the Party meeting which has previously been mentioned (*supra*, pp. 17–18), and which is described more fully at pp. 64–65, *infra*, at which petitioner Schneiderman emphasized that the Party was "still" a Party of "revolution" and pointed out that, for the very reason that "revolution is serious business"—entailing "violence and bloodshed" and "loss of * * * lives"—it demands great care in preparing for it so as to insure its success (A. 146–147).

[33] A State Party letterhead in use in 1948 (Tr. 6717) lists the office of "Field Organizer", with Lima as incumbent, as the third-ranking office in the State organization, preceded only by those of State Chairman and State Organizational Secretary (Ex. 315, p. 1).

[34] The office of State Organizational Secretary is the second highest position in the State Party, being exceeded in rank only by that of State Chairman (Appendix A, *infra*, p. 166, and see fn. 33, *supra*).

Between December 1947 and May 1949 (A. 225, 229), Lima attended, together with petitioners Yates, Stack, Lambert, Fox, Healey, Schneiderman, and Richmond (A. 226–227, 230–231), "[a]t least two dozen" (A. 229) "very secret meetings" (A. 232; see also A. 224–225, 232–233) of the Party's California State Board and San Francisco County Board (A. 225, 228) at the home of witness Bessie Honig in San Francisco (A. 224–234). In December 1950, he was present at and, together with petitioner Richmond, spoke to the Party's "West Oakland convention" in Berkeley (A. 110–112; Tr. 3562). The attendants at this convention, in order to safeguard the secrecy of its location, adopted such precautionary measures as assembling in advance, leaving for the convention hall in groups of three at three-minute intervals, and "park[ing] at least two blocks from the * * * hall" (A. 111). At that time "the whole [West Oakland] section" had recently "under[gone] a change", the constituent "clubs" having all been "dissolved and reorganized into groups" of "[n]ot more than five" persons to a group (A. 110).[35] Similar precautionary measures were taken the following month in connection with the East Bay "regional convention", which Lima, in his capacity as Chairman of the East Bay Region, also addressed (A. 112–113).

Carl Rude Lambert:—Petitioner Lambert has for many years been the Party's "security head" for

[35] For the reasons for this dissolution of the clubs and their reorganization into smaller groups known as "squads", see Appendix A, *infra*, pp. 170–174.

California (A. 235, 28, 152, 327). As such, he has been "the one responsible for the security of the party" (A. 250)—a responsibility he appears to have borne since 1935 (A. 249–250). He has in addition been a regular attendant at meetings of the State Board, including those held in the greatest secrecy, presumably as a member of that body (A. 224–234, 358–360), and he has also held, since 1939 or earlier, either intermittently or continuously, the office of Party "Financial Secretary" for the state (Ex. 574 [A. 446]; Ex. 572 [A. 446]; Ex. 564 [A. 447–448]; Ex. 582 [A. 449–450]).

In 1936, Lambert was one of the group of Party members (which [see *supra,* pp. 27–28] included also petitioners Spector, Dobbs, Healey, Carlson, and Schneiderman) who used to attend "underground meetings" of the Los Angeles County Committee of the Young Communist League in the "private homes" of "trusted members" in Los Angeles—the meetings which, because the League "was a secret organization underground conspiring at that time", were "so hid that you couldn't get to them unless you were invited and taken there" (A. 262–264). From 1944 to 1948, he was one of the previously-mentioned (see *supra,* pp. 14–15) group of Party members—others including petitioners Yates, Fox, Dobbs, Healey, Carlson, Schneiderman, Richmond, and Connelly—whom witness Van Dorn, pursuant to the requests of Schneiderman and Yates that she run the elevator for them on meeting-nights of the State and County Boards, used to take up to the Party's seventh-floor San Francisco

headquarters.[36] He also was one of the select group of Party officials—others including petitioners Yates and Schneiderman—who in April 1945 attended the already-described (see *supra*, pp. 15–16) "Mother" Bloor reception at which "Mother" Bloor spoke with feeling of what she believed to be the near approach of "the day of the revolution" and the "bloody battle" (A. 369, 371–372).

In May or June 1946, Lambert was present, together with petitioners Yates, Lima, and Schneiderman, at the expulsion proceedings against the "left sectarian dissidents" who failed to follow Party orders in the 1945–46 "machinist strike" (A. 151–153; see Appendix A, *infra*, pp. 169–170). As "head of the security committee of the party", Lambert "spoke out against these persons", one of whom was his own brother (A. 151, 153), "and accused them of anti-party activity" (A. 152). He was likewise present (see Appendix A, *infra*, p. 170), together with petitioner Yates, at the subsequent expulsion proceedings against Party member Rosenbaum at which petitioner Fox, denying Rosenbaum's taunting charge that the Party was "not a revolutionary party", affirmed that it "was a revolutionary party" but that the time was not yet ripe for "militant action."[37] And he was also present, together with pe-

[36] Lambert, moreover, was one of the two petitioners (the other being Schneiderman) who, as previously noted (see *supra*, pp. 14–15), used to supply Mrs. Van Dorn with check lists which she used to guard against uninvited or unaccredited individuals being received into the elevator.

[37] A more detailed account of Fox's speech on this occasion appears at p. 41, *infra*.

titioners Yates and Lima, at the Party meeting in February 1947 (see *supra;* pp. 17–18), described more fully at pp. 64–65, *infra,* at which petitioner Schneiderman declared that the Party was "still" a Party of "revolution".

In the spring of 1947, Lambert, as "head of our security", addressed a Party meeting "on the subject of security within our party" (A. 235–236). He read to the members documented "histories of people that had been expelled from the party" (A. 236–237), told them how to "protect themselves from the FBI", and warned them "not to use names or places on the phone" (A. 237). He explained how "to talk around [a] subject in code" and he cautioned them in particular not to use a telephone in the same room in which a meeting was being held, or, if this was unavoidable, at least "to cover it with pillows" (A. 237–238).

In March 1948, he was present (A. 187–188), together with petitioners Healey and Carlson (A. 186, 187), at a Party "functionary meeting" (A. 186) at which petitioner Dobbs made a speech, described more fully at p. 48, *infra,* in which he likened the role of the *Daily People's World,* the Party's West Coast newspaper (see *infra,* pp. 110–112), to that of *Pravda,* the organ of the Russian Bolshevik Party, in the pre-Revolutionary period in that country (A. 190–191).

In July 1950, in his capacity as "chairman of the State Security Board", Lambert was present at a Party meeting in connection with an expulsion-recommendation which had been made by the State Board against witness Sutherland (A. 327–328). Lambert

stated to those in attendance that the leadership of the Party was "purging the party" for "emergency or revolution" (A. 328). In reply to a member's question as to "[h]ow soon" the Party was "expecting a revolution", another member, one Alexander, said that "[t]he European crisis may decide that"[38] (A. 329). Lambert added that "the Korean crisis", too, might precipitate the revolution, and he remarked that if American "aggression continue[d]" in Korea "anything [might] be expected" (*ibid.*). In reply to a question from Sutherland as to whether the Party was "really planning revolution by bullets", Alexander replied, in Lambert's presence, "Just what the hell do you think we are purging the party for?" (*ibid.*).

Rose Chernin Kusnitz.—Petitioner Kusnitz, who is frequently referred to in the record as "Rose Chernin", has been an active Party leader in California since 1946, her most recent position reflected by the record being that of Organizational Secretary of the Midtown Division[39] of Los Angeles County (A. 356). Previously to 1946, her Party activities were in the New York area (A. 45, 317–318).

In April 1943, Kusnitz was Section Organizer[40] of the Party's Bronx Section in New York City (A. 317–

[38] *Cf.* the statement in Peters' *Manual on Organization* (Ex. 61) concerning the necessity of some "governmental crisis" as a condition precedent to a successful revolution (*supra*, p. 13).

[39] For the place of the "division" in the Party's organizational structure, see Appendix A, *infra*, p. 166. The office of Organizational Secretary in a Party unit is next below that of Chairman (*cf.* A. 6).

[40] The "Organizer" of a Party unit is the highest executive official of the unit. See Appendix A, *infra*, p. 166.

318). In a speech which she made at a 1943 Party meeting she emphasized the importance of new recruiting of Party members and pointed out further that, as a consequence of "the men['s]" having to enter the armed forces, it was incumbent on "the women" to assume more active Party roles (A. 318). Thereafter, in the summer of 1945, she attended the Party's New York State Convention of that year (A. 45).

Beginning some time in or about 1946, Kusnitz's Party activities shifted to California. In November of that year, she and petitioner Dobbs were among those in attendance at a Party function in Los Angeles (A. 133–134) at which petitioner Schneiderman, declaring that "free elections in this country can only serve the purposes of the fascists", appealed for, among other things, "immediate cessation of aid to Chiang-Kai-Shek", the "demobilizing of all United States armed forces", the "removal of all * * * American labels from relief goods", and the immediate adoption of "Marxist training" (A. 135). In the same or the following month, she was present, together with petitioners Steinberg, Spector, Dobbs, and Healey, at the previously-mentioned (see *supra*, p. 17) Party meeting at which petitioner Yates "spoke on the Soviet power" and of the necessity of "Soviet * * * support" and "Marxist-Leninist training" as means to the bringing about of the "Soviet * * * type of government" "all over the world" (A. 135–136).

In June 1948, Kusnitz held the office of "Organizational Secretary, 66nd [*sic*] A. D. [Assembly Dis-

trict], Los Angeles" (Ex. 182, p. 1 [A. 581]), this being a "section" of the Los Angeles County Party[41] (*id.*, p. 2 [A. 582]). In her capacity as such, she contributed an article entitled *Party Building and the Fight for Negro Rights* to a publication of the Party's California State Committee entitled *Pre-Convention Discussion Bulletin No. 2* (*id.*, pp. 1–2 [A. 581–582]).[42] The article referred among other things to the Party's "revisionist period" (see Appendix A, *infra*, pp. 144–147); "the Taft-Hartley Slave Bill"; "police terror against the community", which it described as "an every day occurrence" in Kusnitz's section; the "regrouping of our clubs into smaller units";[43] a "six session leadership training seminar" which Kusnitz' section had recently conducted "[i]n order to solve the leadership problem for our smaller clubs"; the fact that "[o]ur section [had] surpassed all other county sections" in a campaign to obtain new subscriptions to the *Daily People's World*, the Party's West Coast newspaper; and a new-recruit "quota" which her section had set for itself in the "Party Building drive" (*ibid.*).

Some time thereafter Kusnitz became Section Organizer—*i. e.*, the leader—of the "West Jefferson Section" of Los Angeles County (A. 356). In August

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[41] For the place of the "section" in the Party's organizational structure, see Appendix A, *infra*, p. 166.

[42] Kusnitz's article shared the front page of this eight-page publication with one by William Z. Foster, the Party's National Chairman.

[43] For the reasons behind this break-up of Party clubs into smaller groups known as "squads", see Appendix A, *infra*, pp. 170–174.

or September 1949, she told witness Brandt that she was leaving this position in order to assume the office of "organizational secretary" of the County's "Midtown Division"[44] (*ibid.*). Within a month or two thereafter (see Ex. 204, p. 1), the so-called "Marxist Institutes" commenced to hold their sessions in Los Angeles County (as well as elsewhere in California). Of thirteen Institute schools established for Los Angeles County, three were scheduled to operate in Kusnitz's Division (Ex. 204, p. 2).[45]

Ernest Otto Fox.—Petitioner Fox, an active Party member in California and the State of Washington since at least 1935 (A. 10, 249), has in recent years been the Party's San Francisco "Maritime Section Organizer" (Ex. 177, p. 3 [A. 579]; Ex. 181, p. 2 [A. 579]).

From 1944 to 1948, Fox was one of the group of Party members—others including petitioners Yates, Lambert, Dobbs, Healey, Carlson, Schneiderman, Richmond, and Connelly—whom witness Van Dorn used to transport by elevator, after checking their names from a check list, to the Party's seventh-floor headquarters in San Francisco on meeting-nights of the California State and San Francisco County Boards. See *supra*, pp. 14–15. Mrs. Van Dorn took Fox up in the elevator, she testified, on some "80 or 100" such occasions (A. 366).

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[44] One of five "Divisions" into which Los Angeles County was divided (Ex. 204, p. 2).

[45] For the pertinent content of the curricula of the "Marxist Institutes", see Appendix A, *infra*, pp. 161–164.

In or about October 1946, Fox was present, together with petitioners Yates and Lambert among others (see *supra*, p. 35), at the expulsion proceedings against Party member Rosenbaum (A. 148–150). Rosenbaum was charged with having "associat[ed] with" certain recently expelled Party members known as "left sectarian dissidents".[46] In the course of Rosenbaum's "fervent * * * defense of himself" as "a better Marxist than anyone present", he taunted his accusers with the charge that the Party "was still" under the influence of "the Browder policies"[47] and that it was "not a revolutionary party" (A. 150). Fox angrily replied that the Party "was a revolutionary party" but that it was "not going to stick its neck out" prematurely and thus risk "getting its head chopped off" (*ibid.*). He added that he himself (*ibid.*)—

> * * * wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not arrived yet.

During 1947 and 1948, Fox was Chairman of the "Joe Galdo club"[48] (A. 283, 285), as well as of the

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[46] For the meaning of "left sectarianism", see pp. 64–65, *infra*, and Appendix A, *infra*, p. 169.

[47] See Appendix A, *infra*, pp. 144–147.

[48] Fox's succession to the chairmanship of this club was the consequence of a reversal by "the [San Francisco] county" leadership of an earlier decision by the club executive board not to name him to that position lest it "endanger [his] citizenship status" (A. 285). "[T]he county", overruling the executive board, "stated that Ernest Fox would be chairman", which settled the matter (*ibid.*). *Cf.* the discussion at Appendix A, *infra*, pp. 168–170, of the Party principle of "democratic centralism".

"warehouse branch" of the San Francisco County Party (Tr. 4394–4395). During the first seven months of 1948, he was present, together with petitioners Yates, Stack, Lima, Lambert, Schneiderman, and Richmond, at at least one of the "very secret meetings" of the Party's California State Board at the home of witness Bessie Honig in San Francisco (A. 230–231) (*supra;* p. 18). In the summer of 1948, a visitor at Fox's apartment observed there "a whole set" of the "[Little] Lenin Library",[49] which Fox had received as a present, he said, while a delegate to a Party convention (A. 289). Also in the summer of 1948, Fox was instrumental in the organization of, and thereafter became Chairman of, what was known as the "Haskell [S]ection" of the Party (A. 283, 284), the creation of which, he said, was necessary in the interests of "better Communist Party organization" (A. 284). In August 1948, he told witness Addy that he had at some time in the past attended "the National Communist School", "located on an estate in New York"; he described to Addy "the secret manner" in which this school was operated and how "every security measure was taken" with respect to it (A. 286). In or about December 1949, he became the Organizer (leader) of the San Francisco "waterfront section" (A. 283, 288), also known as the "Maritime Section."[50]

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[49] The so-called "Little Lenin Library" includes all the basic writings of "Marxism-Leninism".

[50] For articles which Fox has written in this capacity for Party "pre-convention discussion bulletins" in 1950 and 1951, see Ex. 181, p. 2, and Ex. 177, p. 3.

Ben Dobbs.—Petitioner Dobbs, following an active career as a Young Communist League leader in the 1930's, has more recently been active as a Party teacher and labor leader. His most recent Party position reflected by the record has been that of Organizational Secretary[51] of the Los Angeles County Party (A. 108–109, 293).

A member of the Young Communist League since at least as long ago as 1932 (Tr. 6136–6137), Dobbs had by 1935 become its San Francisco "director" (A. 10–11), and he was also in the latter year a "group discussion" leader at League meetings (A. 258). Among the books discussed (*ibid.*) was a *Handbook for Young Communists* issued by the "Educational Department" of the YCL entitled *Young Communists In Action* (Ex. 485 [A. 594]). This *Handbook* explained that the Young Communist League "acknowledge[d] the political leadership of the Communist Party" and shared with it the same "aims and * * * program of action" (*id.*, p. 8 [A. 258, 594–595]), the only "difference between" the two organizations being that the YCL, "a School of Communism", was "open to broad sections of the youth", whereas the Party itself (*id.*, pp. 8–9 [A. 259, 595])—

> * * * admits to membership only those who accept in full the Communist program and the discipline of the Party * * *.

In 1936, Dobbs was one of the group of YCL leaders—others including at least five others of these petitioners (see *supra*, pp. 27–28)—who used to attend

[51] The position next in rank below that of Chairman (*cf.* A. 6).

"underground meetings" of the League in "trusted members' homes" in Los Angeles (A. 262–264). *Two Decades of Progress,* a document published in September 1939 by the Los Angeles Communist Party (Ex. 611), contained a "salute", featuring a photograph of Dobbs, described as the YCL's "executive Secretary", from the Young Communist League to the Communist Party, which it described as the "vanguard party" of the American working class[52] (*id.,* p. 26 [Tr. 5591–5592]).

From 1944 to 1948, Dobbs was one of the group of Party functionaries—others including at least eight others of these petitioners—whom witness Van Dorn used to take by elevator to the Party's seventh-floor San Francisco headquarters on meeting-nights of the California State and San Francisco County Boards. See *supra,* pp. 14–15. Mrs. Van Dorn took Dobbs up in the elevator, she testified, "at least 50 times" during this period (A. 368). In November or December 1946, he was present, together with at least five others of these petitioners, at the Party meeting (see *supra,* p. 17) at which petitioner Yates "spoke on the Soviet power" and related what would have to be done to achieve a "Soviet * * * type of government" "all over the world" (A. 135–136).

By December 1946, Dobbs was "labor chairman", or "County Labor Director", of the Los Angeles County Party (A. 137; Ex. 407), in which capacity,

[52] For the significance of the phrase "vanguard of the working class", see *supra,* p. 12, and Appendix A, *infra,* p. 158. One of the most frequently met expressions in Marxist-Leninist literature, it is jealously claimed by the Party as its most characteristic descriptive phrase.

in May 1947, he was Chairman of a Party-sponsored "May Day Rally" at which petitioner Lima, at that time a member of the Party's National Committee, was the principal speaker (Ex. 407).

In March 1948 (A. 192–193), the Communist Party conducted in Los Angeles a "press school" for the advanced education of Party "press director[s]" (A. 193), admission to which was carefully restricted to persons bearing proper Party credentials (A. 194). Dobbs, an instructor at this school (A. 193–195), required his pupils to read "from page 149 * * * to * * * 159" of the *History of the Communist Party of the Soviet Union (Bolsheviks)*[53] (Ex. 28) (A. 194–195). The students "were granted 20 minutes in which to read" the passage, after which Dobbs "discussed it" with them (A. 195).[54] The passage has to do with the role played by *Pravda*, the official organ of the Russian Bolshevik Party (later the Communist Party of the Soviet Union), in the period preceding the Bolshevik Revolution of 1917. It points out that every issue of the paper was designed to whip up bitterness and resentment among "the workers" so as to achieve "a spirit of proletarian solidarity" among them (Ex. 28, p. 150), and that with these "agitation[al]" aspects

[53] This work, which bears the name of no single author, was "authorized by", "prepared under the supervision of", and "edited by a commission of", the Central Committee of the Communist Party of the Soviet Union (Ex. 28, title page; Ex. 315, p. 4). It was first published in 1939 (Ex. 315, p. 4), and in the same year was copyrighted and published in the United States by International Publishers Co., Inc. (Ex. 28, p. iv), a Party publishing house.

[54] For Dobbs' comments on the passage, see *infra*, p. 47.

of their work the Bolsheviks combined "illegal revolutionary activities" (*id.*, p. 151). *Pravda* "taught the proletariat", the passage states, "that * * * a new revolution was impending" in which "the proletariat must act as the real leader and guide of the people" (*ibid.*). Whereas "[t]he Mensheviks", according to the passage, "worked to get the proletariat to drop the idea of revolution" and to achieve reforms through peaceful methods, "[t]he Bolsheviks explained to the workers that this Menshevik gospel of renunciation of revolution * * * was being preached in the interests of the bourgeoisie", so that "the Mensheviks" were in fact "enemies of the revolution" (*ibid.*). Thus "*Pravda* rallied the legally existing organizations around the illegal centres of the Bolshevik Party and directed the working-class movement towards one definite aim—preparation for revolution" (*id.*, p. 153). To such an extent was this true, states the passage, that the Bolsheviks were in fact called "Pravdists" (*ibid.*).

By thus "skillfully combining illegal work with legal work", the pertinent passage from the *History* continues, "the Bolsheviks won over a majority of the trade union organizations in the two capital cities, St. Petersburg and Moscow" (*id.*, p. 156). The "victory of the Bolsheviks and the defeat of the Mensheviks in the legally existing organizations developed all along the line" (*id.*, p. 157). This victory was achieved "because the Bolsheviks alone had a correct Marxist theory [and] a clear program" and they alone were able to capitalize on "the rising tide of revolution" (*ibid.*). "The revolutionary movement of the workers

steadily developed", continues the passage, "spreading to town after town and region after region" (*ibid.*). The number of striking workers steadily increased (*id.*, p. 158). "Unrest spread to all the factories, and meetings and demonstrations were held everywhere" (*ibid.*). The workers (*ibid.*)—

> * * * started to throw up barricades. * * * In a number of places the police fired on the workers. The government adopted "emergency" measures to suppress the movement; the capital was turned into an armed camp * * *.

While the "advance of the revolution was interrupted by the World War", the passage concludes (*ibid.*), it was later resumed and culminated in the "revolution of October 1917", with the "Pravdists" forming "the hard core" of the triumphant revolutionists (*id.*, p. 159).

When the students had finished reading the above-summarized passage, Dobbs, as we have mentioned, "discussed it" with them, pointing out that it "described the role that Pravda had played in the * * * organization of the revolutionary movement in Russia" (A. 195). Drawing a parallel between "the pre-revolutionary days" in Russia and the present period in the United States, he emphasized to the students that they, as Party "press directors", had the same kind of responsibility with respect to the "PW"[55] and other Party literature as the "Pravdists" had with respect to *Pravda* (*ibid.*).

[55] *I. e.*, the *Daily People's World*, the Party's West Coast newspaper (see *infra*, pp. 110–112).

On another occasion in this same month—March 1948 (A. 186)—Dobbs made a similar comparison between the role of *Pravda* in pre-Revolutionary Russia and that of the *Daily People's World* in present-day America (A. 190–192). This was in a speech which he gave at a Party "functionary meeting" in Los Angeles which was also attended by petitioners Lambert, Healey, and Carlson (A. 186–188). As in the case of the "press school" (see *supra*, p. 45), this was a closed affair, limited to "functionaries only", all persons seeking admission being required to present proper Party credentials (A. 186–187). Dobbs referred in his speech (A. 191) to the same passage from the *History of the Communist Party of the Soviet Union* (see *supra*, pp. 45–47) which he had required his "press school" students to read. He referred among other things to "the value" of *Pravda*, "both when it enjoyed legal * * * existence" and after it was outlawed, "in disseminating information and instructions" to the "members of the revolutionary movement in Russia" (A. 191). The *Daily People's World*, he said, "had a similar purpose over here" in that "[n]ot only did it disseminate news, but it was used when necessary to issue instructions to party workers" (*ibid.*). For this reason, he said, the *Daily People's World* "must not founder", for if that were to happen "we would have no means of communication" with Party workers "other than by word of mouth", with the consequence that the Party in this country would suffer a disadvantage in achieving its aims to which the "members of the revolutionary movement in Russia" were never subject (*ibid.*).

In July 1948, in his capacity as "County Labor Secretary", Dobbs made one of the major reports to the Party's Los Angeles County Convention (Ex. FO, pp. 3, 8), stressing in his report among other things the Party's need to "strengthen our concentration policy"[56] (*id.*, p. 8). And in the same capacity, in January 1949, he "made the main speech of the evening" at the Lenin Memorial Meeting over which petitioner Steinberg presided (A. 210–211; see *supra*, p. 21). In December 1949, by which time he had succeeded to the second-ranking office of Organizational Secretary of the Los Angeles County Party, Dobbs spoke at another Party meeting, at which was celebrated "the 32d anniversary of the Soviet Union" (A. 108–109). In or about March 1950, witness Scarletto, then a Party member, was directed by his "section organizer" to go to the home of Dobbs "to receive instructions on where the next classes [of the Marxist Institute][57] would be held" (A. 96–97). Scarletto was told by Dobbs' wife in Dobbs' presence to wait for another person, "the new instructor", who would conduct Scarletto to the new location, and this was done (A. 97–98).[58]

[56] For details concerning the Party's policy of concentrating its forces in "key" or "basic" industries, *i. e.*, industries "upon which the whole economic system depends"; and the reasons for this policy, see Appendix A, *infra*, pp. 174–177.

[57] For the "Marxist Institute" classes and what was taught therein, see Appendix A, *infra*, pp. 161–164.

[58] In September 1950, witness Lancaster was advised by his "section organizer" that because he, Lancaster, "was associated with a key industry"—the North American Aviation Company—he was not to "carry on any further open activities" in the Party (A. 299); this, Lancaster was told, was at the time a "common" Party ruling, to which "even Ben Dobbs" was subject (A. 300).

Dorothy Healey Connelly (also known as Dorothy Healey).—Petitioner Dorothy Healey Connelly, who is referred to in the record as "Dorothy Healey", has been associated with the Communist Party since at least 1933 (A. 243). From 1945 to 1949, she was Organizational Secretary of the Los Angeles County Party (A. 124–125, 291–292), and since then, until at least April 1951, she has been County Chairman (A. 291–292; Ex. 642 [A. 451]).

In 1936, Healey was one of the group of individuals—others including at least five of these petitioners—who used to attend secret "underground meetings" of the Los Angeles County Committee of the Young Communist League (A. 262–264). (See *supra*, pp. 27–28.) In July 1945, she was present at the National Convention (A. 44) which reconstituted the Communist Party following its "Communist Political Association" interregnum (see Appendix A, *infra*, pp. 144–147); and in August or September of the same year she attended and spoke at the Second Session of the California State Convention (A. 130–131). Declaring in her speech that "the future of the party" was going to be "militant", she urged among other things the "re-education of all Marxists" and the (A. 131)—

> * * * concentration of recruiting in the basic industries, such as the ship industry, steel industry, electrical, transportation, aviation.

She was elected at this session to the Party's California State Committee (A. 124–125; Ex. 398) as well as, at or about the same time, to its No. 2 executive

post for Los Angeles County, *viz.*, Organizational Secretary (A. 124–125).

In August 1946, Healey addressed a Party meeting on the subject of "strikes" (A. 133). "[A]ll strikes in basic industries must be Communist-led", she said, and "trade union leaders" must be "Marxist-trained" (*ibid.*). In addition, she said, the "county Communist Party board" should "from time to time" "be consulted as to [the] progress or success of these strikes"[59] (*ibid.*). In November or December 1946, she was present, together with at least four others of these petitioners, at the Party meeting at which petitioner Yates "spoke on the Soviet power" and told what the Party must do to help bring about a "Soviet * * * type of government" "all over the world" (A. 135–136). In February 1947, she and petitioner Schneiderman made speeches at a Party meeting admission to which was limited to Party members bearing a proper "card" or who could otherwise be "identified * * * at the door" (A. 305). In her speech, Healey, in urging the recruiting of new Party members (*ibid.*), again (A. 306)—

> * * * emphasized the importance of concentrating on the recruiting of * * * workers in the basic industries such as * * * the steel industry, the auto industry, the rubber industry, the oil industry, transportation, coal mining and so forth.

During the first seven months of 1948, Healey was present with petitioners Yates, Schneiderman, and

[59] For the function of the strike, and particularly the general strike, as a political weapon of the Communist Party, see Appendix A, *infra*, pp. 140–143, 160–161.

Richmond at at least one of the previously-mentioned (see *supra,* p. 18) "very secret meetings" of the Party's California State Board held at the home of witness Honig in San Francisco (A. 231). In March 1948, she attended (with petitioners Lambert and Carlson) the "functionary meeting" of the Los Angeles County Party at which petitioner Dobbs analogized the function fulfilled by the Party newspaper *Daily People's World* in present-day America to that of *Pravda,* the Bolshevik Party journal, in pre-Revolutionary Russia (see *supra,* p. 48).[60] In the same month, in her capacity as County Organizational Secretary, she addressed a meeting of "Southside section functionaries" in Los Angeles, the purpose of which was to subdivide the section into two smaller sections for organizational purposes (A. 289–290).

In a July 1948 report which she made to the Los Angeles County Convention (Ex. FO, pp. 2, 8), Healey referred to the Party's war on the "twin evils of left-sectarianism and right opportunism"[61] (*id.,* p. 2) and its struggle to "wipe out * * * the poisonous remnants resulting from Browder revisionism"[62] (*ibid.*). Again stressing the importance of the Party's "policy of concentration" in the "basic" industries, she proposed a "concentration program for Los Angeles" in

[60] Healey, too, spoke at this meeting, admission to which was limited to bearers of proper Party credentials (A. 186–187). In her speech she stressed the necessity of getting active Party members into "positions of leadership" in "labor unions and the factories" (A. 188).

[61] See *infra,* pp. 64–65, and Appendix A, *infra,* pp. 169–170.

[62] See Appendix A, *infra,* pp. 144–147.

accordance with which the Party, as "the vanguard of the working class",[63] would focus its efforts on industrial "concentration points", *i. e.*, those factories and industries containing the "decisive sections" of the working class (*ibid.*). She stressed the need that "our literature", including the "Marxist-Leninist classics", "reach" the workers in these "concentration points" (*id.*, p. 8). And pointing to the importance of "organizational work" in "strengthening our ability to mobilize our forces", she emphasized that, quoting Lenin (*id.*, p. 2),—

> * * * every step of action is worth a dozen excellent arguments about Socialism.

In the summer of 1949, following a plenary session of the Party's National Committee in New York, witness Lautner demonstrated to Healey in his office a portable mimeographing machine designed for use in the Party's "underground" activities (A. 64–67), and she took the machine with her "as a sample" (A. 67–68). By the following September, Healey had succeeded to the Los Angeles County Party Chairmanship (A. 292).[64]

Frank Carlson.—Petitioner Carlson, in 1935 the California "state director" of the Young Communist League (A. 11), was also one of the group of individuals, which included at least five others of these petitioners, who in 1936 used to attend secret "under-

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[63] See fn. 52, *supra*, p. 44.

[64] In January 1950, at a closed Party meeting at which a fellow Party member jocosely introduced her as "the 'Red Queen'," Healey read to the Party members in attendance a letter from National Chairman Foster "congratulating the Los Angeles Communists on their work" (A. 93–94).

ground meetings" of the League's Los Angeles County Committee. See *supra, pp.* 27–28. In the same year he used to lecture to Young Communist League "study groups". (A. 244), and in at least one of his classes he used as the basis of his lecture a work of Lenin's entitled *What Is To Be Done?*, which witness Rosser, one of his pupils, identified as the Government's Exhibit 266 in evidence (A. 244–245). Originally published in Russia in 1902 (Ex. 266, p. 7), the American edition of this work—the one Carlson used—was copyrighted in 1929 by International Publishers Co., Inc. (*id.*, p. 4), a Party publishing house. In an "Editor's Foreword" to this edition (*id.*, pp. 7–8), written by Party publicist Alexander Trachtenberg[65] (*id.*, p. 8), this work of Lenin's is described as "one of [his] outstanding revolutionary writings", "long * * * a classic in its field",—a "brilliant exposition of the policies and tactics of the revolutionary Socialist movement" on which the "first generation of Russian Bolsheviks", including "many of the present Soviet leaders", had been "brought up" (*id.*, p. 7). Pointing out that Lenin viewed as a "travesty on Marxism" the notion that the improvement of labor's "economic" lot should be its "chief preoccupation" (*ibid.*), and observing that Lenin appeals in his book for a "revolutionary" party, made up of persons who will "devote to the revolution * * * the whole of their lives" (*id.*, p. 8), the Foreword describes "the revo-

[65] Trachtenberg was one of the defendants in the trial of the so-called "second-string" Communist leaders in New York. See *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909. He was granted a new trial, and was recently convicted for the second time.

lutionary enthusiasm which permeates [the book's] pages" as well as (*ibid.*)—

> * * * the great lessons it has today for the workers in capitalist countries who would build their revolutionary parties after the pattern fashioned by Lenin * * *.[66]

Carlson told his pupils in his lecture based on this work of Lenin's that they "must look to Lenin for the answer" to the problems of the youth of the world, and that the Young Communist League, which was to be the vehicle of youth's victory in its "fight against fascism", would have to put on "an American front", *i. e.*, be "dress[ed] up" to look like "an American organization", in order that "people would classify us" as such (A. 245). Carlson continued for several years thereafter to be active in League affairs (A. 245–246, 250; Tr. 6227), eventually becoming its president (A. 246).

From the end of 1945 until he left California in 1947 to assume new Party duties in Wisconsin (A. 365; see *infra*, p. 56), Carlson was one of the Party functionaries who "had offices" in the Party's seventh-floor San Francisco headquarters. See *supra*, p. 15. In addition, on at least two occasions in 1946,

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[66] For passages from Lenin's text justifying this evaluation, see Ex. 266, pp. 116–119, 127–128, 163. Of particular interest is Lenin's discussion of the problem of "premature attack", *i. e.*, a revolutionary uprising launched "before political discontent, the ferment and anger of the working class, etc., are sufficiently ripe for it" (*id.*, pp. 127–128). *Cf.* the ruthlessness with which the American Communist Party expels all so-called "left-sectarians" from its ranks on the ground that they are "like the horse that was too far ahead of the cart" (*supra*, pp. 17–18; *infra*, pp. 64–65 and Appendix A, *infra*, pp. 169–170).

he taught "class[es] in Marxism"[67] in these headquarters (A. 361–362), and in the same year he and petitioner Yates co-authored a *Handbook for Club Officers* (Ex. MF) (A. 387–388). See fn. 123, *infra*, p. 113.

In 1947, Carlson left California for Wisconsin, where he became the Party's Wisconsin "state secretary" (A. 280, 365; Ex. 729). In April of that year, he was introduced to Party members at a meeting in Milwaukee as an "organizer" sent by the National Committee to give the Wisconsin Party a "shot in the arm" (A. 276). In acknowledging his introduction, he explained that he had been sent to Wisconsin to "organize" the Party in that state in better fashion, to "get [it] to working better", and to make it "more militant" (A. 277). In the same month he told Party member Estrada that the latter was "a promising young man" who would "make a very good [Party] leader" (*ibid.*) and in this connection he advised Estrada (A. 278) to acquire for himself (among other books) the *Communist Manifesto* of Marx and Engels (Ex. 39), which he referred to as "the bible of the Communist Party" (A. 278),[68] Stalin's *Problems of Leninism* (Ex. 146)[69] and *Foundations of Leninism*

[67] For what the Party was at that time teaching in these classes, see Appendix A, *infra*, pp. 151–161.

[68] For the teaching of the *Communist Manifesto* on the question of the necessity of the use of force and violence in achieving Communist ends, see Appendix A, *infra*, pp. 151, 163.

[69] For pertinent passages from *Problems of Leninism* on the question of the necessity of the use of force and violence in achieving Communist objectives, see Appendix A, *infra*, pp. 156–157, and fn. 31, pp. 157–158.

(Ex. 1),[70] and the *History of the Communist Party of the Soviet Union* (Ex. 28).[71]

He also asked Estrada to organize a Negro "Veterans" organization for the reason that it would be "necessary", when the time for the revolutionary "overthrow [of] this country by the Communist Party" came, that (A. 278)—

> * * * the Negro boys in the North * * * be militant enough to guide the Negro people in the South.[72]

On another occasion he cautioned Estrada not to be inquisitive about the identity of certain Communists (A. 278–280) since "some of these people aren't to be known as Communists" (A. 280).

In March 1948, Carlson, who had in the meantime returned from Wisconsin to California, was present with petitioners Lambert and Healey at the "functionary meeting" of the Los Angeles County Party at which Dobbs analogized the role of the Party newspaper *Daily People's World* in present-day America to that of the Bolshevik Party newspaper *Pravda* in pre-Revolutionary Russia. See *supra*, p. 48. In

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[70] For pertinent quotations from *Foundations of Leninism* concerning the need for force and violence in achieving Communist goals, see Appendix A, *infra*, pp. 152–153, 156, 158, 160.

[71] For relevant excerpts from this Marxist-Leninist "classic", see *supra*, pp. 45–47, and Appendix A, *infra*, p. 155.

[72] Carlson related to Estrada, in this connection, an incident alleged to have occurred in the South, involving "100 * * * armed" Negroes, as an illustration of how "the party has been helpful to the Negro in the South" (A. 277–278). In reply to Estrada's query as to "how did * * * the Negro people down in the South get guns", Carlson said that "the party has methods of doing so" (A. 278).

October 1949, he made a half-hour visit to a session of one of the "Marxist Institute" schools (see Appendix A, *infra*, pp. 150, 161–164) in Los Angeles, the instructor introducing him to the class as "the county organizer" (A. 84). And in June 1951 he was present throughout a four-hour interrogation of witness Scarletto, then a Party member, in connection with a Party "security" investigation of this witness (A. 89–91, 104–105). Scarletto was questioned among other things as to whether he "knew any FBI agents or any policemen" (A. 90), and when it was discovered that Scarletto had the telephone numbers of two other Party members on his person, his interrogators admonished him for thus subjecting fellow Party members to the risk of "get[ting] caught" (A. 91).[73]

William Schneiderman.—Petitioner Schneiderman, a "professional revolutionist" who has given his "whole life" to the Party,[74] has been for many years its California leader and State Chairman (see *infra*, p. 60) as well as one of its national leaders since the early 1930's.[75]

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[73] Yates, the second-ranking official of the California Party (see *supra*, p. 11), testified that during the five-year period preceding the trial she had "been in frequent contact with Mr. Carlson" in connection with her "duties as a member of the Communist Party" (A. 396).

[74] Schneiderman was so described by Party member Steve Nelson in a speech at the 1945 California State Convention (A. 14–15).

[75] Schneiderman was a regular member of the Party's National Committee from 1934 to 1948 (A. 57, 131–132; Ex. MM–1, p. 96; Ex. 650 [A. 598]), since which time he has been an alternate member of that body (A. 115–116; Tr. 301).

Having joined the Young Communist League, at that time called the Young Workers' League (Ex. MM–1,[76] pp. 89–90), in 1922 at the age of sixteen (*id.*, pp. 86, 357), Schneiderman was an organizer and charter member of its California branch (*id.*, p. 87). In 1928, after having served for a number of years as the League's educational director, in which capacity he organized and directed its forums and classes in Marxism-Leninism (*id.*, pp. 87–89), he became its executive head and "official spokesman" (*id.*, p. 91). His membership in the Party proper dates from 1924 or 1925 (*ibid.*), at which time it was known as the Workers' Party (*id.*, pp. 91, 93). After serving as Secretary of the Party in Los Angeles for a number of years (*id.*, p. 92), he became in 1930 Organizational Secretary for "District 13" (*id.*, pp. 92–93), which embraced California and several other states in addition to the Territory of Hawaii (*id.*, p. 96; Tr. 436). Later in 1930, he became the Party's District Organizer for the Connecticut District (*id.*, pp. 94–95), and from 1931 to 1934 he held the corresponding office in the Minnesota District (*id.*, p. 95).

From June 1934 to September 1935, Schneiderman was the Party's delegate to the Seventh World Congress of the Communist International in Moscow (A. 333, 335; Ex. MM–1, p. 95), and during this period he lectured at the Lenin Institute[77] in that

[76] Exhibit MM–1, a defense exhibit, is the transcript of record in the denaturalization proceeding which reached this Court in *Schneiderman* v. *United States*, 320 U. S. 118. The references are to Schneiderman's testimony in that proceeding.

[77] This was the institute which petitioner Stack attended as a student at about that time (see *supra*, pp. 23–24).

city (A. 340). Upon his return to the United States in 1935, he was appointed by the National Committee (A. 2) as District Organizer for "District 13," a position he held until the Party "was reorganized on a state basis" some time thereafter, at which time he became the California Party's "state secretary" (Ex. MM–1, p. 96). Some time between 1942 and 1945 (see Exs. 571 [A. 446] and 566 [A. 446–447]), he succeeded to the State Chairmanship of the Party, a position he has continued to occupy ever since (Tr. 301; Exs. 566, 562, 570, 561, 569, 564, 582, 575 [A. 446–450]).

At his denaturalization hearing in 1939, which culminated in this Court's decision in *Schneiderman* v. *United States*, 320 U. S. 118, Schneiderman, when questioned on cross-examination concerning his 1934–35 visit to the Soviet Union, denied that his trip to that country had been made in the capacity of a delegate or official representative of the American Communist Party to the Communist International (Ex. MM–1, pp. 95–96). He simply "went there on a visit" and to "stud[y] conditions", he testified, though he admitted that the Seventh World Congress of the Communist International was in session while he was there and that he "attended that" (*id.*, p. 95). At the instant trial, however, witness Honig gave sharply differing testimony.[78] Honig testified that Schneiderman not only was a delegate, but that he was in fact "the only" delegate, of the American Communist Party to the Communist International during the

[78] Which testimony, moreover, stands uncontradicted in the present record.

period in question (A. 335). Honig, who was himself a delegate of the Party to the Red International of Labor Unions during the same period (A. 333–334), testified that Schneiderman told him before they left the United States that he, Schneiderman, "was being sent as a representative of the American Communist Party to the Communist International in Moscow" (A. 333). He further testified that during their stay in Moscow they frequently saw each other at Comintern meetings (*ibid.*). Schneiderman's duties as delegate to the Comintern, he told Honig, included attendance at meetings of the Comintern and of the Red International of Labor Unions and reporting on their proceedings to the Party in this country (A. 334).

Honig described, moreover, a meeting of the Red International of Labor Unions, attended by Schneiderman, at which the 1934 San Francisco waterfront strike (see Appendix A, *infra*, pp. 140–143), then in progress, was discussed (A. 335–338). Solomon Lozofsky, the RILU head, stated at the meeting that he had received a letter from Earl Browder, the then general secretary of the American Communist Party, stating that "the party was endeavoring to spread" this waterfront strike "into a general strike of all workers" in San Francisco, and he read portions of Browder's letter to the delegates (A. 336–337). He then "threw the floor open to discussion" as to the proper "policy for the American Party to pursue" with respect to such a proposed general strike (A. 337). In particular, he "called upon Schneiderman", as the "American representative to the Comintern", to "state his opinion on

what the American policy should be" (*ibid.*). Schneiderman replied that he considered the proposed extension of the waterfront strike into a general strike an "excellent" idea and that in his judgment "such a general strike could be produced" (*ibid.*). Lozofsky "reminded" the delegates of the "basic Communist Party policy throughout the world" that "general strikes should be regarded as rehearsals for seizure of power by the party" (A. 338). Other delegates, including Schneiderman, "endorsed what Lozofsky said", Schneiderman remarking that "such a general strike would offer an excellent rehearsal for seizure of power in the United States by the American Communist Party" (*ibid.*). It was accordingly decided that the RILU should recommend to the Comintern that the latter "instruct the [American] party directly to prepare such a general strike" (A. 346–347).

The Comintern meeting at which "the San Francisco situation" was taken up was held later that same week, Honig further testified (A. 338–339). Among those present, in addition to Honig, Schneiderman, and RILU head Lozofsky, was Dimitri Manuilsky, the "head of the Communist International" (*ibid.*). After Lozofsky had introduced the subject of "the San Francisco situation" and reported the RILU's recommendations with respect thereto, Manuilsky stated that he too (A. 339)—

> * * * felt there was need of immediate action on the part of the American Communist Party to bring about such a general strike * * *; that [he and Lozofsky] hoped to start

> such a general strike up and down the Pacific coast, but to start it immediately or as soon as possible, anyway, in San Francisco.

Schneiderman repeated his previously-expressed view that in his judgment "the situation" was "ripe" for such a general strike (A. 339–340), following which the delegates unanimously voted to issue "instructions * * * from the Communist International" "to the American party" to "immediately prepare for such a general strike" (A. 339, 346–347).[79]

Thereafter, in July 1934, the American Communist Party, as it itself claimed in its official theoretical organ, *The Communist*, brought to pass, or was instrumental in bringing to pass, a general strike which for four days immobilized the entire city of San Francisco and the surrounding Bay area. See Appendix A, *infra*, pp. 140–143.

Two years later, in September 1936, Schneiderman participated in a Party meeting at which the idea of bringing about a second general strike was broached, this one to tie up "the entire West Coast" (A. 340–342), with the objective of staging another "[rehearsal] for seizure of power" (A. 342).

On another occasion in 1936 Schneiderman advised one Carlisle, the editor of the *Western Worker*, the Party's West Coast newspaper, that he "was being removed as editor" because of his "dilettante attitude towards his job" (A. 342–343). Pointing out that the "ultimate aim of the party", and hence the *Western*

[79] Honig's testimony concerning Schneiderman's acts and statements in Moscow was offered and received only as against him (Tr. 7690–7691).

Worker's only reason for being, was "to bring about a revolution in the United States and seizure of power by the Communist Party", Schneiderman told Carlisle that his "dilettante attitude * * * was not serving such a purpose" (A. 343).[80]

In April 1945, Schneiderman was present at the previously-mentioned (see *supra*, pp. 15–16) "Mother" Bloor reception at which that lady foretold that "the day of the revolution" with its "bloody battle" was near at hand (A. 369, 371). He afterwards cautioned another of the guests, witness Van Dorn, to keep "everything that [Mother Bloor] said" to herself, as that sort of talk should "be kept quiet" (A. 370–371).

In February 1947, Schneiderman addressed a Party meeting—at which at least three others of these petitioners were also present (A. 145–147)—on the subject of "left sectarianism and right deviations" (A. 146). With respect to "left sectarians"—a Marxist category which included certain Party members who had recently been expelled[81] and who "were accusing [the Party] of not being a revolutionary party"—Schneiderman said that they (*ibid.*)—

> * * * were like the horse that was too far ahead of the cart, that they were impatient, they wanted the party to embark on adventur-

[80] Schneiderman also admonished Carlisle not "to forget" that such Party policies as the "United Front" and anti-"fascism" were merely "tactic[s]" serving the Par y's "ultimate aim of overthrow of the bourgeois government of the United States" (A. 343).

[81] See Appendix A, *infra*, pp. 169–170.

> ous campaigns that would lead to the destruction of the party * * *.

He assured those present, nevertheless, that the Party was "still" a Party of "revolution" (*ibid.*) and that its "ultimate goal" of "socialism" could only be attained "through violent revolution" (A. 147). But he pointed out that "revolution is serious business" (A. 146), that (A. 146–147)—

> * * * revolution means tragedy, it means violence and bloodshed, * * * sacrifices, the loss of property, the loss * * * of relatives, the loss of our own lives * * *.

And while lives "were expendable to achieve the ultimate goal," it was necessary, he said, before a revolution could actually be launched, to lay a careful groundwork—"a mass base"—"among labor, farmers, and minority groups" in order to insure that the uprising, once begun, would end in victory (*ibid.*).

The "right deviation[ists]", on the other hand, said Schneiderman, were guilty of the error opposite to that of "left sectarianism", they being the ones who, having "tied the party" under Browder's leadership "to the code [*sic:* coat?] of the bourgeoisie", had "anesthetized [its] revolutionary potential" (A. 147).[82]

Al Richmond.—Petitioner Richmond has been for many years the executive editor, *i. e.*, editor-in-chief,

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[82] Among Schneiderman's numerous subsequent Party activities (see, *e. g.*, A. 100, 112–113, 203–204, 206, 224–226, 229–231; Exs. 159A, 186, p. 1 [A. 580], 187, 191, 736A) was his collaboration with petitioner Yates in the preparation of one of the "study outlines" (Ex. 163 [A. 620–626]) used by the Party in its 1949–50 "Marxist Institute" schools and classes (A. 396–397; see Appendix A, *infra*, pp. 161–164).

of the Party's West Coast newspaper, the *Daily People's World* (A. 112–113, 367, 405–406; Ex. 186, p. 7; Ex. 736A, p. 2 [see A. 204–205]).

He has been a Party member since at least as long ago as 1931 when, as Organizational Secretary of the Philadelphia District of the Young Communist League, he was "instruct[ed]" by his superior, witness Patterson, to "join the Communist Party" (A. 211–212). In 1932, he covered the New York "waterfront" for the Party's East Coast paper, the *Daily Worker*, in addition to being on its "editorial board" (A. 213). When in December 1937 the Party changed the name of its West Coast paper from the *Western Worker* to the *Daily People's World*, he was selected by the Party's "Central Committee", *i. e.*, its National Committee, to be the paper's managing editor (A. 10; Ex. 636, p. 1). From September 1946 to June 1948 (A. 363, 364, 367–368), he was one of those whom witness Van Dorn used to take by elevator to the Party's seventh-floor San Francisco headquarters on meeting-nights of the California State and San Francisco County Boards. See *supra*, pp. 14–15. He rode up with her, Mrs. Van Dorn testified, on "[s]o many [occasions] I couldn't tell you" (A. 368). In December 1946, he "stressed" in a speech "the Leninist and Marxist approach" in every issue of the *Daily People's World* (Tr. 3953–3954). From December 1947 to May 1949, in company with at least seven others of these petitioners, he attended "[a]t least two dozen" "very secret meetings" of the State and San Francisco County Boards at the home of witness Bessie Honig (A. 224–234).

In 1948, Richmond reported to the Party's California State Convention on the *Use [of] the Press as a Key Political Weapon* (Ex. 186, p. 7). Warning that the press was the Party's "weakest sector", he said there was grave danger that the Party's "tactics of the united front from below" would never bear fruit and that its "vanguard role"[83] would never be "fulfill[ed]" until it achieved greater success in "reaching the masses" (*ibid.*). In 1950, he and petitioner Yates were two of the three individuals who composed the "special committee" established by the State Committee to "help develop the preconvention discussion" (Ex. 181, p. 1).

In December 1950, he and petitioner Lima addressed the Party's "West Oakland convention" (A. 110–112; Tr. 3562), concerning which (see *supra*, p. 33), such extraordinary precautions were taken to safeguard the secrecy of its location.[84] He likewise addressed the East Bay "regional convention" of the following month (A. 112–113), similar precautions in the interest of secrecy having been taken with regard to this convention (*supra*, p. 33). In an article entitled *Strike Struggles—Some Key Conclusions*, which he wrote for the spring 1951 issue of the California Party's "preconvention discussion bulletin" (A. 100; Ex. 191, p. 1), he castigated the "no-strike" policy adopted by the leading labor organizations following "U. S. intervention in Korea", charging that this

[83] *I. e.*, its role of leader of the proletariat in the planned revolutionary seizure of power. See *supra*, pp. 12, 44 (fn. 52), and Appendix A, *infra*, p. 158.

[84] Richmond "represent[ed] the state committee" at this convention (A. 111).

policy was part of a plot which these organizations had entered into with "big business" to support the United States' "imperialist aggression" against Korea (Ex. 191, p. 3).

Philip Marshall Connelly.—Petitioner Connelly was at the time of the trial, and had been for some years prior thereto, the "Los Angeles editor" of this same West Coast Party organ, the *Daily People's World* (A. 294–295, 406; Ex. 736A, p. 2 [see A. 204–205]).

He has been a Party member since at least 1938, when he was a Party delegate to a convention of the International Newspaper Guild in Toronto (A. 344–345).[85] In June or July 1940, he was present with petitioner Steinberg at the County Committee meeting of the Los Angeles Party at which was discussed the Party's campaign strategy in the forthcoming Presidential election, including the proposed use of the slogan "Don't support the imperialist war; vote Communist"[86] (A. 247–248). In March 1941, at another meeting of this Committee, the purpose of which was to discuss ways and means of "mobilizing" community sentiment against the war as "imperialistic" and "to raise the slogan among the people of defense of the Soviet Union",[87] Connelly said that "if the Commu-

[85] For witness Honig's account of the strategy conferences participated in by Connelly and the other Communist delegates to this convention, among whom was the "head of the Communist Party of Canada" (A. 346), for the purpose of "co-ordinat[ing] their activities" so as to achieve the "desired aims" of the Party at the convention and in particular to capture control of the Guild's "executive board", see A. 344–346.

[86] Concerning which slogan see fn. 18, *supra*, p. 20.

[87] The German-Soviet Non-Aggression Pact was still in effect at that time (see A. 255).

nists work[ed] correctly, they could really do a good job" in these respects, particularly in "building up sentiment against * * * the war effort" among steel, aircraft, and shipyard workers (A. 251–252). At a Party meeting in June 1941, held during a strike at the North American Aviation Company, to settle which "the government had threatened to bring in * * * soldiers", he stressed "the need for the Communists to get together and mobilize the city" against such "government interference" (A. 253).

From the fall of 1945 to June 1948 (A. 364, 374), Connelly was one of the group of individuals whom witness Van Dorn used to take by elevator to the Party's seventh-floor San Francisco headquarters, after checking their names from the check list supplied her, on meeting-nights of the California State and San Francisco County Boards. See *supra*, pp. 14–15. Mrs. Van Dorn took Connelly up, she testified, on at least a "half dozen" occasions during this period (A. 374). And in or about May 1947 he was present at a Party meeting at which was discussed the question of "whether or not the Party would have to go underground", and at which a Party member "from New York" told the local members that he would "help them in any way possible" in such a project (A. 331–332).[88]

[88] See Appendix A, *infra*, pp. 170–174. For other Party activities of Connelly, including his participation in a Party group discussion program on "why * * * I join[ed] the Communist Party" (A. 329–330), see A. 140–142, 253–255, 275.

SUMMARY OF ARGUMENT

I

Petitioners' convictions are not based, as they claim, on an interpretation of the Smith Act which conflicts with the First Amendment as construed in *Dennis* v. *United States*, 341 U. S. 494. On the contrary, this case is governed by *Dennis* with respect to First Amendment issues.

A. The trial judge correctly explained to the jury the meaning of "advocacy" of violence. There was no need to give petitioners' requested instruction explaining that meaning in terms of "incitement" to violence. The word "incite" has two shades or variants of meaning. It may connote, on the one hand, simply the idea of "urging" the taking of some action, without any necessary implication that such action is urged to be taken *immediately*. In this sense of "incite," the requested instruction was quite correct. But there is another, and perhaps more common, sense of "incite" which involves precisely this connotation of immediacy. In this sense—the sense in which the term was suggested by petitioners' counsel—the term would be inappropriate, since it might have given the jury the mistaken impression that in order to convict it was necessary for them to find that the object of the conspiracy was the advocacy of *present* force. *Dennis* makes clear that no such finding is necessary.

B. The "clear and present danger" test is satisfied. The question is not alone how imminent, in some absolute sense, the forcible overthow of the Govern-

ment was, during the three-year period (1948–1951) preceding the return of the indictment, as a consequence of petitioners' activities. The Government need not wait to take punitive action against the advocacy of its violent overthrow until such overthrow becomes a literal "present danger." The question is whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. *Dennis* v. *United States*, 341 U. S. at 510. If, as *Dennis* held, the danger was sufficiently clear and present in 1948, it can hardly be thought to have been less so in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from "cold" to "hot" war. *United States* v. *Flynn*, 216 F. 2d 354, 367 (C. A. 2), certiorari denied, 348 U. S. 909.

That petitioners may have lacked the power, as individuals, to bring about the evil at which the Smith Act strikes is immaterial. The point is that they, like the *Dennis* defendants, were parties to and, in high degree, *leaders* of the same "highly organized conspiracy, with rigidly disciplined members subject to call when the leaders * * * felt that the time had come for action" (341 U. S. at 511). And it is "the existence of the conspiracy which creates the danger" (*ibid.*).

II

Even if, as petitioners claim, the part of the indictment which charges them with having conspired to "organize as the Communist Party" a society of persons who teach and advocate the forcible overthrow

of the Government was barred by the statute of limitations (on the theory that the organization of the Party was completed more than three years prior to the indictment's return), that fact could make no difference in the circumstances of this case. The jury, by its verdict, must have found that petitioners conspired to advocate and teach the duty and necessity of forcibly overthrowing the Government *and* to "organize as the Communist Party" a society of persons who so teach and advocate. There is consequently no basis for the assumption (on which petitioners' contention rests) that the jury "may have convicted petitioners for conspiring to 'organize', even if they found no conspiracy to 'advocate and teach'" (Br. 288).

In any event, petitioners' argument that the Communist Party was completely "organized" in 1945, within the meaning of the "organizing" clause of the Smith Act, with the result that the statute of limitations barred prosecutions for conspiring to violate that part of the Act after 1948, is untenable. The organization of a group such as the Communist Party is a continuing process, as no one recognizes better than the Party itself. This very case provides an abundance of evidence that the organizing of the Party is not the static event for which petitioners contend, but rather a process which goes on constantly as the Party, day by day, seeks to improve its position, regroup its forces, and strengthen its structure as it prepares itself for effective action when the call comes.

Congress was not concerned, when it enacted the "organizing" provision of the Act, with the procedural mechanics by which a paper organization is initially established. What it was concerned with is continuing activity to recruit and indoctrinate members—and their gradual organization into units and branches of an ever more efficient, but sinister, working group. Petitioners' construction would defeat to a major degree the congressional purpose behind the clause in question. For under their interpretation this provision, enacted in 1940, could never have been applied to the leaders and organizers of the Communist Party (which was initially organized in 1919), had it not been for the fortuitous 1944–45 interlude of the "Communist Political Association," followed by "reconstitution" of the Party. But the legislative history shows beyond any doubt that the organization at which the Act was particularly aimed was the Communist Party.

The meaning which the judge attributed to the term "organize", moreover, finds ample support in its common or dictionary definition.

III

The evidence, which was in essentials uncontradicted, amply supports the convictions. Petitioners' challenge of the sufficiency of the evidence is primarily an attack on the veracity of the prosecution witnesses. But the credibility of the witnesses was for the jury to determine.

The prosecution's proof did not consist, as petitioners argue, merely of evidence that they were

members and officers of the Communist Party. In the first place, petitioners were shown to have been, not simply members and officers of the Party, but the long-time California *leaders* of that organization. In the light of the nature of the Party as shown by the evidence, particularly its highly disciplined character, the jury would have been thoroughly justified in refusing to believe that petitioners could have risen to the high positions in the Party hierarchy to which the evidence shows they did rise, without having come to know along the way, and to know very well, the Party's central teaching on the duty and necessity of forcibly overthrowing this Government, and without personally intending and desiring that this basic Party aim be realized "as speedily as circumstances would permit." Furthermore, the jury had before it a wealth of additional evidence—personal acts, statements, and teachings by petitioners themselves, as well as acts, statements, and teachings of others done or uttered in their presence—which in its cumulative effect was far more than sufficient to warrant the conclusion that each petitioner possessed the necessary knowledge of the Party's violent objective and the specific intent to achieve that aim.

The fact that petitioners Richmond and Connelly's role in the over-all conspiracy was primarily that of editing the Party's West Coast newspaper does not insulate them from the consequences of their having knowingly joined the conspiracy.

IV

The commission of overt acts in furtherance of the conspiracy within the limitations period was adequately proved. First, the commission of many such acts within the statutory period, the sufficiency of which is hardly questionable, was established by the evidence. Second, the two overt acts which were charged as such and proved (attendance at "Lenin Memorial Meetings") were also of a quality sufficient to fulfill the statutory requirement. It was at such meetings that the Party was augmented and strengthened through the recruitment of new members. Lenin, moreover, was the architect and guiding genius of the Russian Bolshevik Revolution, which Communists the world over seek to duplicate. And the great majority of the Marxist-Leninist "classics"—the chief medium of the Party's teachings on force and violence—either were written by Lenin or purport to expound his teachings. At at least one of the rallies, moreover, an appeal was made for funds with which to finance the continuation of the Party's activities. It was not necessary that appeals to overthrow the Government by force be made at such a meting in order for attendance at the meeting to fulfill the overt act requirement. The overt act need not be criminal in character at all; much less the very crime which is the object of the conspiracy.

V

Petitioners received a fair trial.

A. The trial judge did not abuse his discretion in refusing to grant a continuance because of the publi-

cation in a Los Angeles newspaper, during the weeks immediately preceding the commencement of the trial, of the so-called "Philbrick articles," none of which mentioned any petitioner. All prospective jurors were specifically questioned at the *voir dire* examination as to whether they had seen or read these articles. Only one panel member answered affirmatively, and she was not among those selected to sit on the jury which heard the case.

B. The refusal to declare a mistrial on the basis of the publicity given to the release by a Senate Committee of an FBI memorandum purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the Government was a proper exercise of discretion in the circumstances of this case. The memorandum contained nothing that was not contained in the exhibits which the jury had heard read into evidence. Realistically, moreover, it could not have been news to any juror that the FBI shared the prosecution's view that the Communist Party teaches forcible overthrow of the Government, especially in view of the fact that defense counsel had themselves brought out at the trial the fact that agents of the FBI had sat at the government counsel table throughout the trial. The most that petitioners were entitled to was to have the judge question jurors as to whether any of them felt in the slightest degree unable, as a result of the incident, to base his verdict solely on the evidence adduced in the courtroom, and to have any juror who might answer affirmatively replaced by an alternate juror. The judge offered to do this, but petitioners rejected the offer.

VI

Petitioner Schneiderman's prosecution was not barred by this Court's 1943 decision setting aside his denaturalization. The determination of fact which the jury made against Schneiderman in this case was not inconsistent with what the Court determined in the earlier case. The only question involved there was whether the Government had sustained its burden of proving by "clear, unequivocal, and convincing" evidence that Schneiderman was not, on the date of his naturalization in 1927, and had not been during the preceding five-year period, attached to the principles of the Constitution and well disposed to the good order and happiness of the United States. The issue here was whether Schneiderman had been, from 1948 to 1951, a knowing member of a conspiracy to teach and advocate the duty and necessity of forcibly overthrowing this Government and to organize as the Communist Party a society of persons so teaching and so advocating. Not only were the critical time-periods in the two cases some 20 years removed, but this Court made very clear in *Schneiderman* that it was not passing upon the question of whether the Communist Party at that time taught and advocated, or had ever taught and advocated, the forcible overthrow of this Government. The fact established by *Schneiderman* was merely the negative one that the Government had failed to prove by the requisite standard of evidence that Schneiderman was not attached to the Constitution during the critical years preceding his naturalization; the Court did not decide that he

was so attached. There being no inconsistency between what the earlier case decided and what the jury had to find to convict Schneiderman in this case, the principle of *res judicata*, or collateral estoppel, did not bar his prosecution. *Sealfon* v. *United States*, 332 U. S. 575.

ARGUMENT

The petitioners, as the principal organizers and leaders of the Communist Party in California, have been convicted of conspiring with the defendants in *Dennis* v. *United States*, 341 U. S. 494, to teach and advocate, and to help to organize the Communist Party to teach and advocate, the violent overthrow of the Government of the United States. The petitioners' dominant ro in the Communist Party in California is undisputed. Their convictions were based upon evidence closely paralleling that adduced in the *Dennis* case and upon the principles enunciated by this Court in that case. Their activities were carried on in the same context of world conditions which in *Dennis* and in *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909, was held to justify the application of the Smith Act. The challenges which petitioners make to their convictions are all without merit, and there is no reason to overturn the verdicts against them.

I

THE SMITH ACT AS CONSTRUED AND APPLIED IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners strongly contend (Br. 216–274)[39] that their convictions are invalid because they are based on an interpretation and application of the Smith Act which assertedly conflicts with the First Amendment as construed by this Court in *Dennis* v. *United States*, 341 U. S. 494. We submit that there is no such conflict; on the contrary, the instant case is governed and controlled by *Dennis* so far as any question relating to the First Amendment is concerned.

A. *The instructions to the jury correctly explained the meaning of "advocacy" of violence, and there was no need to give petitioners' requested instruction explaining that meaning in terms of "incitement" to violence—a term bearing an inappropriate connotation of immediacy*

Petitioners' first contention (Br. 216–258) is that the trial court's instructions to the jury did not properly explain the meaning of "advocacy" of force and violence as used in the Act and indictment and as construed by this Court in the *Dennis* case. Specifically, they say, it was error for the court to refuse to give their requested instruction that, to convict, the jury must find that the object of the conspiracy was ad-

[39] "Br." will be used to refer to petitioners' main brief, that in No. 6. The petitioners who petitioned separately—Schneiderman (No. 7) and Richmond and Connelly (No. 8)—adopt all the contentions of the main brief by reference, and advance others peculiar to themselves. References to the separate briefs of these latter petitioners will be indicated by the abbreviations "Br., No. 7" and "Br., No. 8". References to the petition for certiorari ("Pet.") are to the petition in No. 6.

vocacy of the violent overthrow of the Government by language "reasonably and ordinarily calculated to *incite* persons to such action" (Br. 220–227, emphasis added). Petitioners' reliance on *Dennis* is misplaced; their requested instruction is not essential to sustain a Smith Act conviction.

It is true that in the *Dennis* case Judge Medina's charge included an instruction like the one requested here.[90] And it is likewise true that this instruction was quoted in two of the prevailing opinions in this Court in connection with the general discussion of the First Amendment issue (*Dennis* v. *United States*, 341 U. S. 494, 511–512 (main opinion[91]), 544–545 (Mr. Justice Frankfurter, concurring)). Nothing in these opinions, however, warrants petitioners' conclusion that this exact instruction—or its substance, provided at least the specific word "incite" be used[92]—*must* be included in the instructions to the jury in all Smith Act prosecutions for convictions thereunder to be sustainable.[93]

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[90] See Record, No. 336, Oct. Term, 1950, pp. 12486–12487.

[91] We shall thus refer to the opinion of Mr. Chief Justice Vinson, in which Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Minton joined.

[92] It is clear from petitioners' argument that they regard "incite" as a key and crucial word in the instruction in question, so that, while they would not insist on a *verbatim* repetition of the instruction, they would accept no substitute for "incite"—such, for example, as "urge", a word Judge Mathes did use in his instructions (see *infra*, pp. 85–86).

[93] Neither opinion, in quoting the instruction in question, was addressed to the present issue. The focus of attention in the main opinion was, in fact, on a different paragraph of Judge Medina's charge (see 341 U. S. at 512–513).

The Government's view with respect to the instruction in question is that, while, properly understood, it is entirely correct,[94] there is on the other hand nothing sacrosanct about its phraseology, and that the idea which it was intended to express can be expressed equally well, and was in fact conveyed in the charge in this case, in other language.

The word "incite" has two shades or variants of meaning. It may connote, on the one hand, simply the idea of "urging" the taking of some action, or "moving to action by inducement or persuasion",[95] without any necessary implication as to *when* such action is meant to be or is urged to be taken. Specifically, there is in this sense no implication that the action to which the speaker "incites" his listener is meant to be taken *immediately*. This was the sense in which Judge Medina used the term in his *Dennis* instructions (since there was no evidence that the defendants in that case, any more than the defendants in this case, ever advocated the use of *immediate*

[94] The instruction has been given in several Smith Act prosecutions since the *Dennis* case (see, *e. g.*, *Frankfeld* v. *United States*, 198 F. 2d 679, 687 (C. A. 4), certiorari denied, 344 U. S. 922), including *United States* v. *Mesarosh*, 223 F. 2d 449 (C. A. 3), pending on certiorari, No. 20. The Government, in fact, included the instruction among its own proposed instructions in the present case (see Government's Proposed Instruction No. 21, appearing at pp. 35–36 of the Appendix to petitioners' reply brief below, which petitioners have filed with the Clerk of this Court).

[95] See, *e. g.*, Webster's *New International Dictionary* (2d ed., unabridged); Funk & Wagnalls, *New Standard Dictionary* (1947); *Century Dictionary and Cyclopedia* (1911); Murray, *New English Dictionary* (1901).

violence[96]), and this was the sense in which it was acceptable to the Government in this and other Smith Act prosecutions (see fn. 94, *supra*, p. 81).

There is, however, another sense of "incite"—and perhaps a more common one—which involves precisely this connotation of immediacy. The various standard dictionaries, for example (see fn. 95, *supra*, p. 81), give as synonyms for the term—in addition to expressions of neutral shade so far as any connotation of immediacy is concerned—such words and phrases as "goad", "instigate", "stir up", "rouse", "fire", "excite", etc. One dictionary gives "to spur or urge on" as a synonym, adding, by way of illustration, "as, to *incite* a mob to violence."[97] The connotation of immediacy in such an example is, of course, unmistakable.

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[96] To the contrary, as the evidence in the present case so forcefully demonstrated, the advocacy of violence before conditions are "ripe" for revolution is uncompromisingly opposed by the Party as "left sectarianism"—a deviation from the proper principles of Marxism-Leninism; and the advocates of such premature use of violence are ruthlessly expelled as enemies of the Party who, because they lack a real appreciation of the magnitude of the task involved in such an undertaking, endanger the Party's program and objective of *successful* revolution achieved through the *opportune* use of violence (see *supra*, pp. 16, 17–18, 41, 55 [fn. 66]; Appendix A, *infra*, pp. 139–161, 169–170). The "left sectarians", as petitioner Schneiderman so aptly phrased it, by being "impatient" and "want[ing] the party to embark on adventurous campaigns", are "like the horse that was too far ahead of the cart" (*supra*, pp. 64–65). There was a real danger, as Schneiderman pointed out, that such "adventurous campaigns", or sporadic acts of violence committed without realistic prospects of early victory, "would lead to the destruction of the party" (*ibid.*).

[97] Webster's *New International Dictionary* (2d ed., unabridged).

The ambiguity to which we refer has definite relevance in the context of a Smith Act trial. The following colloquy at the instant trial between Judge Mathes and trial counsel brought the issue sharply to focus (Tr. 12441–12442):

> The COURT. What is * * * language that is incitement to action? That means anything at all to me. I don't know what it would mean to the jury.
>
> Mr. MARGOLIS [a defense attorney]. It means to act immediately, to move right now into action. It means the man who is standing——
>
> Mr. NEUKOM [a government attorney]. I can't agree.
>
> Mr. MARGOLIS. — before a group and he says, "Go break open the bar and lynch that man in the jail." That is what incitement means. It means it moves them to immediate action. Shouting fire in a crowded theatre is language of incitement, your Honor.
>
> The COURT. All language worth listening to involves ideas. It is language of incitement, isn't it, to a greater or less degree?[98] The test here is not immediately, but as speedily as circumstances would permit.

This colloquy (see also Tr. 9693) makes clear why Judge Mathes was unwilling to instruct the jury as to the meaning of "advocacy" in terms of "incitement to action." He was concerned—not without reason—lest to do so might have given the jury the mistaken im-

[98] *Cf.* Mr. Justice Holmes' observation that "Every idea is an incitement" (*Gitlow* v. *New York*, 268 U. S. 652, 673 (dissenting)), and Mr. Justice Frankfurter's reference to Holmes' observation in his concurring opinion in *Dennis*, 341 U. S. at 545.

pression that in order to convict it was necessary for them to find that the object of the conspiracy was the advocacy of *immediate* violence—the teaching of a duty to overthrow the Government by the use of *present* force. That such an impression would indeed have been a mistaken one—that it is not necessary for the jury in a Smith Act prosecution to make any such finding of advocacy of immediate violence—is plain from all of the prevailing opinions in the *Dennis* case. See 341 U. S. at 509 (main opinion); *id.* at 545–548 (Mr. Justice Frankfurter, concurring); *id.* at 568–570 (Mr. Justice Jackson, concurring).[99] For it "cannot [be]", as observed by Mr. Chief Justice Vinson in the main opinion, "that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If [the] Government is aware that a group aiming at its overthrow is attempting to *indoctrinate its members* and to *commit them to a course whereby they will strike when the leaders feel the circumstances permit,* action by the Government is required"—and the opinion also refers to striking "when they thought the time was ripe" or when "the time had come for action" (341 U. S. at 509, 510, 511 [emphasis added]).

The distinction which this Court drew in *Dennis* between the kind of speech which may and the kind which may not be punished consistently with the First Amendment is not the distinction, which petitioners pose, between the advocacy of immediate violence to

[99] See also *Gitlow* v. *New York*, 268 U. S. 652, 671–672, holding that it was not necessary that the accused in that case, to be punishable under the substantially identical state statute there involved, should have advocated "immediate" acts of violence.

effect this Government's overthrow and the advocacy of future violence to that end; the proper distinction is rather the distinction between *advocating* violence (whether present or future) and mere *discussion* of, *theorizing* about, *abstract approval* of, or *prophesying* concerning the use of violence as a political weapon. See 341 U. S. at 501–502 (main opinion); *id.* at 545–547 (Mr. Justice Frankfurter, concurring); *id.* at 570–572 (Mr. Justice Jackson concurring). The true differentiation between the type of speech which is constitutionally punishable by Congress and that which is constitutionally immune was epitomized in Mr. Chief Justice Vinson's observation that the Act "is directed at advocacy, not discussion" (at 502).[100]

In the case at bar, the judge, using appropriate language of his own, carefully instructed the jury on all aspects of this issue. He correctly defined the necessary terms, drew the proper distinctions between the kinds of speech forbidden by and the kinds permissible under the Act, and explained with precision just what it was that the indictment charged the defendants with having conspired to do (Tr. 13752–13756; *United States* v. *Schneiderman,* 106 F. Supp. at 934–935).[101] He explained, for example, that "the word 'advocate' means to urge or 'to plead in favor of; * * * to support, vindicate, or recommend publicly * * *'" (Tr. 13752; 106 F. Supp. at 934). He

[100] *Cf.* Mr. Justice Frankfurter's observation that "[t]hroughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken" (341 U. S. at 545).

[101] The entire instructions are set forth at Tr. 13728–13773 and also at 106 F. Supp. 927–941.

charged that "[t]he holding of a belief or opinion does not constitute advocacy"; that "the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief"; and that "[p]rediction or prophecy is not advocacy" (*ibid.*). And he emphasized that (*ibid.*)—

> Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.

The judge also stressed the necessity that the jury, to convict any one of the accused, find that he personally "had the specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" (Tr. 13748, 13753–13754, 13766–13767; 106 F. Supp. at 933, 935, 939).

Since these instructions correctly explained what the jury had to find to convict, and carefully differentiated what would not suffice, it was proper for the judge, in his discretion, to decline to give petitioners' requested instruction defining "advocacy" in terms of "incitement", particularly in view of the ambiguous and potentially misleading character of that term.[102]

[102] The special reliance of petitioners Richmond and Philip Connelly on the First Amendment (Br. No. 8) because of their connection with the *Daily People's World* is treated, *infra*, pp. 109–115.

B. *The "clear and present danger" test is satisfied*

Petitioners next argue (Br. 259–274) that the trial judge made no proper finding of the existence of a "clear and present danger" that the substantive evil at which the Smith Act is directed would result from their advocacy and teaching. They contend that the judge erroneously treated the finding which the jury made—that petitioners each had the specific intent to bring about the forcible overthrow of the Government "as speedily as circumstances would permit"[103]—as though this were the equivalent of the requisite "clear and present danger" finding (Br. 260–261).

It is possible that the trial judge did regard the jury's finding of the existence of this specific intent on petitioners' part as sufficing, without more, to satisfy the "clear and present danger" test. See *United States* v. *Schneiderman,* 102 F. Supp. 87, 96; *United States* v. *Schneiderman,* 106 F. Supp. 906, 923. If so, his "clear and present danger" finding would have been deficient, since such a finding entails a taking into account of objective conditions prevailing in the nation and in the world during the relevant period, in addition to the subjective element of the accused's intent. *Dennis* v. *United States,* 341 U. S. at 510–511. It is to be noted, however, that in both of his opinions the judge made specific reference to the portion of the main opinion in *Dennis* (341 U. S. at 508–511) affirming the finding of the requisite "clear and

[103] The jury were instructed that they had to make this finding in order to convict (Tr. 13748, 13753–13754, 13766–13767; 106 F. Supp. 933, 935, 939). See *supra,* p. 86.

present danger" in that case (at 510–511). It is possible, therefore, that what the judge intended to do was to accept, so far as the objective element of the "clear and present danger" is concerned, the *Dennis* finding on that point as his own.

In any event, it makes no real difference whether Judge Mathes' conception of the precise nature of the "clear and present danger" test was correct or not,[104] For, as *Dennis* held, the question of whether or not the test is satisfied in a given case is in the nature of a "question of law" (341 U. S. at 511–515). The consequence is that, even where there is no question as to the correctness of the trial judge's conception of the nature of the test, but only as to the correctness of his finding, the Court of Appeals must make an independent appraisal of the issue, and this Court, should the case reach it, will similarly give independent consideration to the question. 341 U. S. at 510–511. This being so, it is evident that at the present stage of the case the "clear and present danger" determination must be made *de novo* by this Court, and it is immaterial whether that decision was cor-

[104] Mr. Justice Holmes himself, the coiner of the "clear and present danger" phrase (*Schenck* v. *United States*, 249 U. S. 47, 52), appears in a later reference to the test to have given quite as much prominence to the subjective element of intent as Judge Mathes did in the case at bar. *Abrams* v. *United States*, 250 U. S. 616, 627 (dissenting). Judge Mathes relied to a considerable extent on the latter statement of Mr. Justice Holmes in the formulation of his own conception of the character of the "clear and present danger" test in this case (see *United States* v. *Schneiderman*, *supra*, 106 F. Supp. at 923).

rectly made in the first instance by the trial court or the Court of Appeals.[105]

That "the requisite danger" (*Dennis,* 341 U. S. at 510) in fact existed is not, we submit, to be doubted; there was during the three-year period immediately preceding the return of the indictment, 1948–1951, a sufficiently "clear and present danger" of the occurrence of the evil at which the Smith Act is aimed (the overthrow or attempted overthrow of the Government by force and violence) to warrant petitioners' conviction for having conspired to engage in the proscribed advocacy and teaching to that end. The question is not alone how imminent, in some absolute sense, the forcible overthrow or attempted overthrow of the Government was during that period as a consequence of petitioners' activities. The Government need not wait to take punitive action against the advocacy of its violent overthrow until such overthrow, or an attempt thereat, becomes a literal "present danger". *Dennis* v. *United States,* 341 U. S. at 509–510. Nothing in the Constitution requires the Government to subject itself to a real risk of its own forcible destruction; the contrary view would make of that instrument a "suicide pact."[106] The true question is, rather, "whether the gravity of the 'evil', discounted by its

[105] Here, the Court of Appeals appears not to have made any independent finding on the "clear and present danger" issue, the court having shared with the trial judge the view that the jury's verdict included an implicit finding of "clear and present danger" (R. 127–128).

[106] *Terminiello* v. *Chicago,* 337 U. S. 1, 37 (Mr. Justice Jackson, dissenting).

improbability, justifies such invasion of free speech as is necessary to avoid the danger." [107]

This Court, in holding the "clear and present danger" test to have been satisfied in *Dennis*, observed that "[t]he mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt" (341 U. S. at 510). This point is of equal pertinence to the case at bar. For the petitioners here were members of, and leaders of, that same group. Theirs was the same conspiracy. If junior in rank to the *Dennis* petitioners,[108] they nevertheless served in the same army and were engaged in the same mission. Nor were the "world conditions" of 1945–1948, to which the Court in *Dennis* referred (341 U. S. at 511), of a less "inflammable nature" in 1948–1951. "[I]f the danger was clear and present in 1948", as Mr. Justice (then Circuit Judge) Harlan, speaking for the Second Circuit, observed in *United States* v. *Flynn*, 216 F. 2d 354, 367, certiorari denied, 348 U. S. 909, "it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Com-

[107] This formulation of the "clear and present danger" test by Chief Judge Learned Hand, writing for the Second Circuit in the *Dennis* case, 183 F. 2d 201, 212, was specifically adopted in the main opinion in this Court, the opinion noting that the test as thus formulated succinctly takes into consideration the relevant factors and "relates their significances" (341 U. S. at 510).

[108] With the arguable exception of petitioner Schneiderman (see *supra*, pp. 58–65).

munist world had moved from cold to hot war." [109]

A final facet of petitioners' "clear and present danger" argument is that the "clear and present danger" test cannot be met in their case because, they say, they never had the "power to bring about the evil" of violent overthrow (Br. 261–262, 272–273). They base their argument on the Court's remark in *Dennis* that "[w]here there is doubt as to the intent of the defendants, the nature of their activities, or *their power to bring about the evil,* this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. at 516 (emphasis added)). Petitioners, however, have certainly mistaken the purport of the Court's remark. It may be assumed that as individuals they were without the power to bring about the evil at which the Smith Act strikes. But, as individuals, so were the defendants in the *Dennis* case. The point is that petitioners, like the *Dennis* defendants, were parties to and, in high degree, leaders of the same "highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these [*Dennis*] petitioners, felt that the time had come for action" (341 U. S. at 511). The fact that the particular echelons of the conspiracy at which petitioners operated were a

[109] In 1950, Congress enacted the Internal Security Act, 64 Stat. 987, Section 2 of which contains the findings of Congress as to the nature and purposes of the Communist movement abroad and in this country during a large part of the period covered by this indictment. See *Carlson* v. *Landon*, 342 U. S. 524, 535–536; *Galvan* v. *Press*, 347 U. S. 522, 529; Brief for Respondent, *Communist Party* v. *Subversive Activities Control Board*, Oct. Term, 1955, No. 48, pp. 209 *et seq.*

step or two removed from that of the *Dennis* defendants is of no consequence. Petitioners played their roles in the upper rungs of the Party's hierarchy; some of them can properly be called national leaders, and all were important and active in the top spheres of the California branch of the Party. In their hands lay the power to direct and utilize the forces and resources of the conspiracy in that state when the proper time should come. "It is the existence of the conspiracy which creates the danger" (*Dennis*, 341 U. S. at 511), coupled with the positions of leadership which petitioners held.[110]

II

THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY AS TO THE MEANING OF "ORGANIZE" AS USED IN THE ACT AND INDICTMENT

The trial judge, in instructing the jury as to the nature of the charge contained in the "organizing"

[110] It is unnecessary, in our view, to consider petitioners' contention (Pet. 29–35; Br. 219–220, 249–250) that the Court of Appeals' judgment is based on an "erroneous premise" as to the legal effect of the 1948 codification of the Smith Act as 18 U. S. C. 2385. The court in its opinion (see R. 109–117) expressed the view that the omission of the Smith Act's conspiracy clause from the new code section, as the result of which conspiracies to violate that section have since been required to be prosecuted under the general conspiracy statute (18 U. S. C. 371), which requires the commission of an overt act, resulted in certain significant changes (in addition to the new requirement of proof of an overt act) in the legal considerations applicable to Smith Act conspiracy prosecutions. The merits of this view need not be discussed, for we have assumed, with petitioners, that the 1948 codification had no effect other than to bring into play in subsequent Smith Act conspiracy prosecutions the general conspiracy statute with its requirement of an overt act. It should be noted that since July 24, 1956, proof of an overt act has again become unnecessary. See Public Law 766, 84th Congress, which, *inter alia*, restored the conspiracy clause to 18 U. S. C. 2385.

branch of the indictment (see *supra*, p. 6), explained that (Tr. 13756; 106 F. Supp. at 935)—

> * * * the charge of the indictment in effect is that the defendants knowingly and wilfully conspired to organize and help to organize the Communist Party as a means or vehicle to advocate and teach the necessity and duty of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances would permit. Thus the issue in this case, insofar as the Communist Party is concerned, is whether the defendants or any of them conspired with others to organize or help to organize and use the Communist Party for such advocacy and teaching as charged.

Then the judge gave the following instruction, the correctness of which is challenged by petitioners (Br. 274–288), as to the meaning of the term "organize" (Tr. 13756; 106 F. Supp. at 935–936):

> The verb "organize", as used in the Smith Act and the indictment, includes the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization.[111]

Petitioners contend that this explanation of the meaning of the term "organize", as used in the Smith Act, is contrary to the "ordinary", "natural" mean-

[111] Similarly, paragraph 3 of the indictment had charged (see *supra*, p. 7) that as part of the conspiracy petitioners and their co-conspirators "would cause to be organized groups, clubs, sections, and district, state, and national units of said [Communist] party * * * and would recruit, and encourage recruitment of, members to said party, concentrating on recruiting persons employed in key basic industries and plants" (R. 2-3).

ing of the term (Br. 281–284) and inconsistent with the congressional purpose in enacting the clause of the Act in which the term is contained (Br. 278–281). They argue that a society is organized "when at a formal convention a constitution is adopted and officers and committees elected" (Pet. 44; see Br. 281–283); that "the Communist Party [was] organized when it c[ame] into being and [was] endowed to function as the Party" (Pet. 44), and that this event (see Appendix A, *infra*, pp. 145–147), occurred in 1945 (Pet. 45–46; Br. 274–275). Accordingly, they say, the trial judge should have instructed the jury that the three-year statute of limitations barred their conviction under the "organizing" branch of the indictment, or that he should otherwise have withdrawn this part of the charge from the jury's consideration (Pet. 45–46; Br. 277–78, 288).

1. In the first place, even if petitioners' contention were sound, it could make no difference in this case. The indictment charged petitioners with having conspired to violate the Smith Act by advocating and teaching the duty and necessity of overthrowing the Government by force and violence *and* by organizing as the Communist Party a society of persons who so teach and advocate (R. 2; see *supra*, p. 6), and the jury were instructed that, to convict, they must find that petitioners had conspired to violate the Act in *both* the ways alleged (Tr. 13739–13740, 13747; 106 F. Supp. 930–931, 934). The verdict thus represents a finding by the jury that petitioners conspired in both those ways.

Hence, it is not true that, as petitioners argue, "the jury may have convicted petitioners for conspiring to 'organize', even if they found no conspiracy to 'advocate and teach'" (Br. 288), and such cases as *Stromberg* v. *California*, 283 U. S. 359, 367–368, *Williams* v. *North Carolina*, 317 U. S. 287, 292, and *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45, on which petitioners rely (Br. 288), have no application here. Those cases establish the general principle that where a jury's verdict may be based on any one of several possible findings of fact, some of which would be sufficient to support the verdict, but others of which would for some reason be insufficient, the verdict must be set aside because of the impossibility of being sure that it is based on one of the good grounds. Here, on the other hand, we know from the verdict that the jury found that petitioners conspired to "advocate and teach" violent overthrow as well as to "organize" as the Communist Party a group who so teach and advocate. The consequence is that, as observed by the Court of Appeals (R. 119), it is immaterial whether the "organizing" clause of the indictment was or was not barred by limitations. Cf. *Haupt* v. *United States*, 330 U. S. 631, 641, n. 1; *Todorow* v. *United States*, 173 F. 2d 439, 445, n. 9 (C. A. 9), certiorari denied, 337 U. S. 925.

2. But the argument is unsound in any event. The short answer to it is that the organization of a group such as the Communist Party is a continuing process. No one, indeed, recognizes this fact better than the Party itself. The State or District leader is commonly referred to as the "District Organizer" (see

Appendix A, *infra*, p. 166). The second in command is called the "Organizational Secretary" for the State, County, or other unit, as the case may be (see Appendix A, *infra*, pp. 166–167). The organizational structure of the Party is constantly undergoing modification, subdivision, revamping, and regrouping.

This very case provides an abundance of evidence that the organizing of the Party is not the static, once-done-and-forever-accomplished event for which petitioners contend, but rather a continuous process which goes on as the Party, day by day, seeks ever to improve its position, regroup its forces, and strengthen its structure as it prepares itself for effective action when the call comes. Thus, for example, petitioner Spector, in 1936, according to witness Saunders, "came out from New York to become the county organizer in San Francisco" (A. 12); some fourteen years later, in 1950, the record identifies him as the "southern division organizer" for Los Angeles County (A. 292, 293). In 1945, petitioner Lima was the Party "field organizer * * * working out of [the] San Francisco office" (A. 12); three years later, in 1948, he is still (or again) identified in the record as the "Field Organizer" for the same County organization (Ex. 315, p. 1). In 1947, petitioner Carlson, who has been up to that time busy with Party work in California, is suddenly transferred to Wisconsin as "an organizer from the national committee", commissioned to give the Wisconsin Party "new life, a sort of shot in the arm"—that is to say, "to organize us a little better, see to it that we became more militant, and to get us to working better" (*supra*, p. 56; A.

276–277); two years later, in 1949, we find him back in California as the Los Angeles "county organizer", with presumably the same or a similar function there (*supra*, pp. 57–58; A. 84). In 1943, petitioner Kusnitz was a "section organizer" in the Bronx, New York (*supra*, p. 37; A. 317, 318); in 1949, she is "organizational secretary" of the "Midtown Division", Los Angeles County. (*supra*, pp. 39–40; A. 356). In the summer of 1948, petitioner Fox was instrumental in organizing the "Haskell [S]ection" of the Party in San Francisco in the interest of "better Communist Party organization" (*supra*, p. 42; A. 284). In the same year we find the "Southside section" of Los Angeles County being split up into smaller sections for organizational reasons, with petitioner Dorothy Healey Connelly, in her capacity as "county org. sec." (Organizational Secretary), addressing the meeting at which this change is effected (*supra*, p. 52; A. 289–290). Some six years previously, in or about 1942, the California State organization itself had been split off for organizational reasons from former "District 13", which had embraced several western states in addition to California (Appendix A, *infra*, pp. 165–166). Beginning about 1947, all Party clubs were broken up into "squads" consisting of not less than three and not more than five persons each, this organizational change being part of the process whereby the Party prepared to "go underground" (Appendix A, *infra*, pp. 173–174). The establishment of the elaborate "three-system" as described by witness Lautner (Appendix A, *infra*, pp. 171–172)—this to constitute the Party's "underground" component—

is a further example of the Party's ever continuing process of organizing itself to meet new conditions.

Congress was not concerned, as petitioners suppose, with the procedural mechanics by which a paper organization is initially established; what it was concerned with is continuing activity to recruit and indoctrinate members and the gradual organization of them into units and branches of an ever more efficient, but sinister, working group. Accord: *Wellman* v. *United States*, 227 F. 2d 757, 765 (C. A. 6), petition for certiorari pending, No. 9, Misc. By separately referring in § 2 (a) (3) of the Smith Act (*supra*, p. 5) to persons who organize or help to organize "any society, group, or assembly of persons * * *", Congress sought to reach the leaders of such groups. Petitioners' construction of "organize" would in effect obliterate to a major degree this clause of the Act. For under their interpretation, this provision, enacted in 1940, could never, had it not been for the fortuitous 1944–45 interlude of the Communist Political Association (see *supra*, pp. 144–147), have been applied to the leaders and organizers of the Communist Party, since the Party was initially organized in 1919 (Appendix A, *infra*, p. 139), some 21 years before the enactment of the Smith Act. Yet the legislative history shows beyond any doubt that the organization at which that Act was particularly aimed was the Communist Party.[112]

To avoid the principle that statutes will not be given an interpretation which frustrates a clear legis-

[112] See, particularly, Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 74th Cong., 1st sess., on H. R. 4313 and H. R. 6427, May 22, 1935, Serial 5, p. 3 *et seq.* The bills referred to were early versions of the bill which became the Smith Act. See also 84 Cong. Rec. 10454.

lative purpose, petitioners assert that Congress modeled the Smith Act after the California Criminal Syndicalism Act, under which, they say, the word "organize" was construed by the California courts as embracing only the initial creation of an organization (Br. 279–280).[113] Accordingly, they contend, it

[113] Petitioners cite three inferior-court California decisions on the point (Br. 279–280). To the extent that these decisions might be deemed authorities even in California for the broad view that the task of "organizing" a society or group of persons can under no circumstances, or in no sense of the term, be considered as continuing beyond the initial creation date, their pertinent observations are clearly *dictum*. The earliest of the three, *People* v. *Thurman*, 62 Cal. App. 147 (1923), held merely that a defendant who had done nothing more than publish and distribute propaganda leaflets advocating criminal syndicalism could not be said to have "assisted in organizing" the International Workers of the World; the court mentioned in its opinion that there was "no evidence that the printed propaganda resulted in adding a single recruit to the cause for which appellant labored" (at 153), and added, in a further *dictum*, that even if the accused's efforts "had resulted in adding one or more members, such increment of membership would not have amounted to 'organizing' the [I. W. W.]" (at 152–153). The second case, *People* v. *Thornton*, 63 Cal. App. 724, 726–727 (1923), held merely that the act of procuring a single new member for the I. W. W. did not constitute "assisting in organizing" that organization; the court, citing the *dictum* of the earlier *Thurman* case, *supra*, observed in its opinion that the organization "was completely organized and in existence at and prior to that time" (at 727). The relevant language in the third case, *People* v. *Ware*, 67 Cal. App. 81, 84 (1924), appears also to be *dictum*, *viz.*, that the act of bringing new members into an organization already "organized and in existence" does not constitute "assisting in organizing" such a group, the *Thurman* and *Thornton* cases being cited for that view.

It will be noted that each of these cases, even including their *dicta*, was concerned solely with the question of whether the bringing of a new member or members into an organization constitutes assisting in organizing the group. The challenged instruction at bar, on the other hand (see *supra*, p. 93), dealt with—in addi-

must be presumed that Congress intended to use the word "organize" in the Smith Act with the meaning given to it by the California courts—citing *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 304–308; *James* v. *Appel*, 192 U. S. 129, 135; and *Joines* v. *Patterson*, 274 U. S. 544, 549 (Br. 280–281). But in *Carolene Products Co.* v. *United States*, 323 U. S. 18, 26, this Court, while noting that these cases "have established under suitable conditions" the "general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording", cautioned nevertheless that "It is a presumption of legislative intention, however, which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention."

The legislative history of the Smith Act contains no indication that Congress was aware of the California decisions (see fn. 113, *supra*, p. 99) relied upon by petitioners. More important, that history affirmatively shows that the draftsmen of the Smith Act were using as their principal model the New York Criminal Anarchy Act,[114] which was involved in *Gitlow* v. *New*

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tion to "the recruiting of new members"—"the forming of *new units*, and the regrouping or expansion of existing *clubs*, *classes and other units*" [emphasis added].

[114] While the Smith Act does have numerous resemblances to the California Criminal Syndicalism Act of 1919 (Stats. 1919, c. 188; General Laws, Act 8428), this is true, generally speaking, only to the extent that the California Act is itself similar to the earlier (1902) New York Act (Laws 1902, c. 371; Penal Law, § 161).

York, 268 U. S. 652.[115] Since the "organize" clause of the New York statute[116] has not been judicially construed to give the narrow interpretation urged here by petitioners, there is no basis for presuming that Congress intended to adopt such a meaning by con-

[115] The Smith Act, Title I of the Alien Registration Act of June 28, 1940, 54 Stat. 671, was added to the bill which became that Act on the floor of the House as an amendment offered by Congressman Smith of Virginia (84 Cong. Rec. 10451–10452, 10454). Mr. Smith stated that Congressman McCormack of Massachusetts was "really the author of the language" (*id.* at 10452; cf. 86 Cong. Rec. 9032). By this he meant that the language of the proposed amendment (set forth at 84 Cong. Rec. 10451–10452) was substantially the same as the language of H. R. 4313 introduced in 1935 in the 74th Congress. At that time, Mr. McCormack appeared before a House Judiciary Subcommittee in support of a shortened version of H. R. 4313, H. R. 6427, stating that the bill represented one of the recommendations of the Special (McCormack-Dickstein) Committee on Un-American Activities (Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 74th Cong., 1st sess., on H. R. 4313 and H. R. 6427, May 22, 1935, Serial 5, p. 2). In answer to a question as to whether the bill was drawn "along the same lines as the New York State statute," Mr. McCormack answered (*id.*, p. 6):

> Exactly; only in more simplified form. We have eliminated a number of elements which are contained in most State statutes.

And in the discussion at the hearing, repeated reference was made to *Gitlow* v. *United States*, *supra*, which involved a prosecution under the New York statute (*id.* at pp. 5–7, 11–12, 37, 41, 102–103, 107, 110, 126). See also Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 76th Cong., 1st sess., on H. R. 5138 [the bill which became the Act, *supra*, whose Title I is the Smith Act], April 12 and 13, 1939, Serial 3, pp. 83–85.

[116] The clause reads as follows: "[Any person who:] 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine [criminal anarchy]. [is guilty of a felony, etc.]" (N. Y. Penal Law, § 161 (4)).

sciously modeling the Smith Act after the New York statute. Accordingly, the trial judge was correct in interpreting the word "organize" in a realistic manner so as to carry out the purpose of Congress.

There is, finally, no warrant for petitioners' contention (Br. 281–284) that the meaning which the judge attributed to the term is alien to its common or dictionary definition. Webster's *New International Dictionary* (2d ed., unabridged) defines "organize" as meaning:

> 1. To furnish with organs; to give an organic structure to. * * *
>
> 2. To arrange or constitute in interdependent parts, each having a special function, act, office or relation with respect to the whole; to systematize; to get into working order; as, to *organize* an army; to *organize* recruits.
>
> * * * * *

Similarly, Funk & Wagnalls' *New Standard Dictionary* (1947) defines the term as meaning:

> 1. To bring into systematic connection and cooperation as parts of a whole, or to bring the various parts of into effective correlation and cooperation; as, to *organize* the peasants into an army.
>
> * * * * *

As observed by the court below (R. 118)—

> * * * If one started out to organize the 25th Army with nothing more than the order creating the entity, organization would not be complete simply because the headquarters had been put together and the general officers and

> staff officers selected. The bare cadres of the regiment would not be sufficient. Recruitment, formation of units, completing officer personnel, regrouping of personnel in different units and expansion of various units to the prescribed or desired strength would be necessary. * * *

Moreover, the trial judge's explanation of the term as including "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units * * *" (*supra*, p. 98) falls squarely within the foregoing dictionary definition as including "bring[ing] the various parts of into *effective* correlation and cooperation" (*supra*, p. 102; emphasis added). Making effective the correlation of the various parts of the Party was the precise purpose of the recruiting, regrouping, and expansion to which the judge referred. That was the purpose of the recurring organizational activities evidenced in this case (*supra*, pp. 96–98; Appendix A, *infra*, pp. 138–139, 144–147) which the Party ceaselessly carries on as it day by day seeks to make itself an "effective" instrument for the accomplishment of that for which it was created and toward which it aspires, *viz.*, successful violent revolution. As petitioner Yates herself testified, her duties as State "Organizational Secretary" consisted among other things (see A. 394), of "helping to organize recruiting drives in order to build the Communist Party and make it a bigger organization" (A. 393).

III

THE EVIDENCE AMPLY SUPPORTS THE VERDICT

Petitioners contend (Br. 124–186; Br., No. 7, pp. 24–34; Br., No. 8, pp. 31–95; Pet. 47–76) that the evidence is insufficient to support the jury's verdict that each of them "knowingly and wilfully joined the conspiracy alleged in the indictment with the specific intent to overthrow the Government of the United Sates by force and violence as speedily as circumstances would permit" (Pet. 47). "Unless membership and officership in the Communist Party alone establish participation in the illegal conspiracy charged herein and the requisite specific intent", they say, "there is absolutely no basis for" their conviction (Pet. 48). We submit that petitioners err and that their convictions are amply sustained by the evidence.

Petitioners' summary of the evidence (Br. 13–90; Br., No. 7, pp. 3–22; Br., No. 8, pp. 4–25) is far from adequate. Apart from its errors of omission, much of it is devoted to charges and insinuations that the testimony of the Government's witnesses—which, as observed by the Court of Appeals, "was in essentials uncontradicted" (see *supra*, p. 9, fn. 9)—was in large part either consciously false or the product of faulty memories. In the case of petitioner Yates, who alone of the petitioners elected to take the witness stand, the summary is scarcely more than a recapitulation of her own testimony (see Br. 13–47). But, as this Court has emphasized, issues of credibility are for the triers of the facts, not for reviewing courts, to resolve (*On Lee* v. *United States*, 343 U. S. 747,

757–758),[116a] and "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U. S. 60, 80.

The evidence adduced by the Government is summarized in the statement, *supra,* at pp. 9–69, and in Appendix A, *infra,* pp. 138–177. It fully supports the jury's determination that the conspiracy charged in the indictment existed during the period referred to in the indictment (1948–1951), and that each petitioner was a knowing member thereof with the requisite specific intent. That the Communist Party, throughout this period, advocated and taught the duty and necessity of overthrowing the Government of the United States by force and violence was proved, here as in the prior Smith Act cases, by overwhelming evidence (see Appendix A, *infra,* pp. 149–164). There was likewise clear and convincing proof that each petitioner knew of this teaching, and that he conspired with his codefendants and the other alleged coconspirators (the *Dennis* defendants), to advance and propagate this teaching through the vehicle of the Party, and that each intended the advocated action, *i. e.,* violent overthrow of the Government, to be accomplished "as speedily as circumstances would permit."

The prosecution's proof did not consist, as petitioners argue (Br. 145–146, 159–160; Pet. 48), merely

[116a] The jury were cautioned to "carefully scrutinize" and "[weigh] with great care" each witness' testimony in the light of "motive", possible "self-interest", the circumstances surrounding his joining and leaving the Party, and possible "hostility" towards the accused (Tr. 13733–5; 106 F. Supp. at 929). The decisions cited by petitioners do not support their argument (Br. 130, fn. 71a) that these cautionary instructions were not adequate.

of evidence that they were members and officers of the Communist Party.[117] In the first place, petitioners were shown to have been, not simply members and officers of the Party, but the long-time California *leaders* of that organization, an organization which, the evidence showed, imposed the most rigid discipline—a "truly iron" discipline—on all its members from top to bottom, and which tolerated no doctrinal deviation from its basic tenets, least of all from its teaching on the necessity of force and violence to achieve its ends. See Appendix A, *infra*, pp. 168–170. Not even the deviation known as "left sectarianism"—the advocacy of what the Party deemed a too early, or premature, use of violence (*supra*, pp. 16, 17–18, 41, 55 [fn. 66], 82 [fn. 96])—was tolerated. Indeed, that and its opposite twin, "right deviationism", whose "Browderite" disciples would "anesthetize" the "revolutionary potential" of the Party, were shown by the evidence to have been dealt with with ruthless severity by the Party and their adherents excoriated and expelled, regardless of how "good, sound party members" they might otherwise have been (*supra*, pp. 64–65; Appendix A, *infra*, pp. 169–170).

This fact of petitioners' undoubted Party leadership, when considered in conjunction with the Party's highly disciplined character and its extreme secrecy (see Appendix A, *infra*, pp. 168–174), suffices to show that each of the petitioners had the knowledge and the intent with which they were charged. It would be too much to suppose, as petitioners' argument as-

[117] If this had been the case, it is evident that the prosecution's case, instead of taking months to present, could have been presented in a single day.

sumes, that a Party member could rise from the ranks to membership on the National Board (petitioner Schneiderman) or National Committee (petitioners Schneiderman, Lima, and Yates[118]), or to the California State Chairmanship (Schneiderman), or to the second highest State office of Organizational Secretary (Yates and Stack), without having come to know along the way, and to know very well, one of the most central and most emphasized of all the Party's teachings—the duty and necessity of overthrowing this Government by force—and without personally intending and desiring that this basic and fundamental aim of the Party be realized "as speedily as circumstances would permit."

Hardly more believable is the supposition that Party members could advance, after years of vigilantly-scrutinized apprenticeship, to such lesser but still highly important positions in the Party hierarchy as State "security head" (Lambert), State Secretary[119] (Carlson), County Chairman (Healey), County Organizational Secretary (Dobbs), County Educational Director (Steinberg), Division Organizer[120] (Spector), Division Organizational Secretary (Kusnitz), and

[118] In Yates' case, alternate membership.

[119] *I. e.*, for Wisconsin (see *supra*, p. 56); Carlson was also, at a later date, the "county organizer", or leader, of Los Angeles County (see *supra*, p. 58).

[120] *I. e.*, of the Southern Division of Los Angeles County, the most recent position held by Spector. The "Division" is the unit next below that of County, it being used in certain counties only (see Appendix A, *infra*, p. 166). The "Organizer" of a unit is the leader of that unit. Earlier, in 1936, Spector had held the even higher-ranking position of "county organizer" for San Francisco County (*supra*, p. 28).

"Maritime Section" Organizer (Fox), without acquiring that same knowledge and having that same intent and desire. The same is true of a member who, like petitioner Richmond, was able to rise to the executive editorship, *i. e.*, editorship-in-chief, of the *Daily People's World*, the Party's sole western newspaper, serving the entire West Coast area, and of one who, like petitioner Philip Connelly, achieved the "Los Angeles editorship" of that organ. The inference that each of these individuals possessed the requisite knowledge and intent is the product of common sense and common experience, together with the detailed proof of the nature, structure, and objectives of the Communist Party. The jury would, therefore, have been warranted in making that inference on the basis of petitioners' high and active positions in the Party hierarchy.

But the Government proved far more than that petitioners were the California leaders of an organization of the type which the Party was shown to be. It adduced, besides, a wealth of additional evidence—personal acts, statements, and teachings by petitioners themselves, as well as acts, statements, and teachings done or uttered by others in their presence—which in its cumulative effect was far more than sufficient to warrant the conclusion that each petitioner possessed the necessary knowledge of the Party's violent objective and the specific intent to achieve that aim. No useful purpose would be served in re-summarizing that evidence here. It is set forth in the Statement, *supra*, at pp. 11–69, collated according to the individual petitioners. In reviewing this proof it should not be for-

gotten that it is unnecessary for individuals to "meet and shake hands to be co-conspirators" (*United States* v. *Mesarosh*, 223 F. 2d 449, 455 (C. A. 3), pending on certiorari, No. 20). That is to say, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances'" (*Glasser* v. *United States*, 315 U. S. 60, 80). On that basis, the proof that each petitioner knowingly and with the required intent participated in the conspiracy charged was sufficient by any standard to sustain the verdicts. There are numerous statements advocating violent revolution made by most of the petitioners, or by other Party members in their presence, or in books from which they taught or which they urged on others.

Petitioners Richmond and Connelly:—The fact that petitioners Richmond and Connelly's role in the overall conspiracy was primarily that of editing the *Daily People's World*, the Party's West Coast newspaper, does not, as they argue in their separate brief (Br., No. 8, pp. 99–104), insulate them from the consequences of their having knowingly joined the conspiracy. They attempt to picture their activity as merely the exercise of freedom of the press, but it is plain that proof that a conspirator's "party role, in part, was that of editor and publisher rather than of gunman" does not provide him with any cloak of immunity from the consequences of his knowing participation in an illicit conspiracy to which his newspaper activities are merely an adjunct. *United States*

v. *Lebron*, 222 F. 2d 531, 536 (C. A. 2), certiorari denied, 350 U. S. 876.

Petitioners Richmond and Connelly were definitely proved to be members of the conspiracy. The *Daily People's World* (commonly referred to simply as the *People's World*) is the successor (since 1938) of the *Western Worker*, the Party's former "Western Organ" (Ex. 621, p. 2; Ex. 659 [see A. 18]). Richmond was selected to be its managing editor by the "Central [*i. e.*, National] Committee" of the Party in 1937 (Ex. 636, p. 1; A. 10). More recently, and for many years, he has been its "executive editor", *i. e.*, editor-in-chief (A. 113, 367, 405–406). Connelly in recent years has been its "Los Angeles editor" (A. 406). Witness Saunders, a former member of the District Committee for "District 13" (which included California among other states), testified that the "editor or the assistant editor or the business manager" of the *Daily People's World* was "invariably" present "at all district meetings" and that the paper "was discussed at every district meeting" (A. 5). And whenever the District Committee "arrived at any decision on political or organizational matters," there would "automatically * * * be either an editorial or some pertinent article about that particular subject in the next issue" (*ibid.*). One or more representatives of the paper, including Richmond and Connelly, commonly attended California State Board meetings, including the most secret (A. 224–225, 227–228, 367–368, 373–374). Its "articles * * * reflected the attitude and the policy of the Communist Party on the various subjects of which

they spoke"; "[o]therwise, they wouldn't have been printed" (A. 18).

The Party has regularly exercised discipline, even to the point of expulsion, over any functionaries of the *Daily People's World* who deviate from the Party line (A. 184–186, 313–315, 342–343, 584–587). The paper has been used as a basis for educational discussions at Party meetings (A. 25, 37) and Party meetings have regularly been held for the purpose of raising funds for it and to increase its circulation (A. 34, 95–96, 98, 234–235, 253–255, 292–294). The three-section application form used in recruiting new Party members (Tr. 1553–1554) used to contain as one of its sections a subscription form for the *People's World* (Ex. 389 [A. 589]). Petitioner Dobbs has compared its role to that of *Pravda*, the official organ of the Russian Communist Party, during the pre-Revolutionary period in that country; like *Pravda*, he said, the *People's World* fulfils the function of "disseminating information and instructions" to the "members of the revolutionary movement" (A. 191; and see *supra*, pp. 45–48).

The importance attached to the *People's World* in achieving Party goals is further reflected by the observation made by petitioner Schneiderman in discharging an editor of the Party's predecessor paper, the *Western Worker*, because of his "dilettante attitude": The "ultimate aim of the party", said Schneiderman, "and the reason for the publication of the *Western Worker*" was to "bring about a revolution in the United States and seizure of power by the Communist Party"—aims which, he said, were poorly served by the editor's "dilettante attitude" and "petty

bourgeois" tendencies (A. 343; see also *supra*, pp. 63–64).

In these circumstances, it is irrelevant that the *Daily People's World* did not and does not, any more than does its East Coast counterpart, the *Daily Worker*, or than did the pre-Revolutionary Bolshevik organ *Pravda*, publish overt appeals to its readers to overthrow the Government by force. The high strategic importance of this newspaper to the Party's over-all objective was its usefulness in "sow[ing] the seed of Marxist-Leninist understanding among the masses" (Ex. 2, p. 826), "blow[ing] the smoldering fire of the people's resentment" (*id.*, p. 819) against real or fancied grievances in order to attract potential recruits to the Party, and, in general, attempting to gain the "sympathy of the masses" (Appendix A, *infra*, p. 155) so as to facilitate the Party's task of forcible seizure of power once "the revolutionary tide" is high and the time is ripe for action (Appendix A, *infra*, p. 161).

The very first of the *Conditions of Affiliation to* [sic] *the Communist International* provided that—

> Everyday propaganda and agitation must bear a genuinely Communist character. All organs of the press belonging to the party must be edited by reliable Communists who have proved their loyalty to the cause of the proletarian revolution.[121]

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[121] As quoted in Lenin's *The Communist International* (Ex. 514, p. 202 [A. 566]). As noted at Appendix A, *infra*, p. 170, fn. 50, the *Conditions of Affiliation* were adopted at the Second World Congress of the Communist International.

Without a "Communist press that will enlist all the masses", said Lenin, "preparation for the dictatorship of the proletariat will be impossible."[122]

That the Party in the United States similarly regards its press as a vital weapon in the attainment of its revolutionary objective may be seen from the 1946 report of National Board member and alleged co-conspirator John Williamson to the Party's National Committee (Ex. 2, p. 826):

> Our press * * * helps plow the ground, sow the seed of Marxist-Leninist understanding among the masses. Without such work, our Party will not be able to speed the growth of a class-conscious, united working class, schooled in struggle and theory, and led by a strong Communist Party.[123]

Further, said Williamson, the Party press is useful as a "blacksmith's bellows" capable of (*id.*, p. 819)—

> * * * blow[ing] the smoldering fire of the people's resentment into a fighting flame * * * that will sweep America from coast to coast.

"A paper is what we need above all," said Lenin; it should be "the starting point of all our activities, the first practical step towards creating the organization we desire * * *." Quoting these words of Lenin in the April 1949 issue of its theoretical organ, *Political Affairs*, the Party similarly emphasized the

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[122] *Id.*, p. 174 (A. 566).

[123] *Cf.* the statement on "The Role of the Press Director" in *A Handbook for Club Officers* (Ex. MF, pp. 15, 16), a booklet written by petitioners Yates and Carlson (A. 387–388): "Press Director[s] should * * * [k]eep a list of all new readers (with addresses and occupations) to be worked with as sympathizers and developed into Party members, with special attention to concentration workers." For the meaning of the term "concentration workers", see Appendix A, *infra*, pp. 174–177.

importance of its press in this country in the winning of its objectives (Ex. 265, p. 75).[124]

In sum, the fact that Richmond and Connelly had risen to their respective positions of trust and prominence on the *Daily People's World* (the Party's only newspaper for the entire West Coast), considered in the light of the Party's proven goal of ultimate violence, the great strategic importance which it attached to this newspaper, and the iron discipline which it exercised over all Party functionaries on the paper's staff, justified the inference that these petitioners were well aware of the nature of the Party and that they personally shared the intent and desire that its revolutionary end be achieved "as speedily as circumstances would permit." Both, in addition, were proved to be active attendants at committee meetings, including those conducted under conditions of strictest secrecy, of the State and County Committees of the Party (*supra*, pp. 66–69). Subject only to the authority of the National Committee, these committees laid down the "line" for the whole Party in California and controlled the entire Party apparatus, including the curriculum of its schools and classes (Appendix A, *infra*, pp. 147–148). Adduced, besides, was a variety of other evidence (see *supra*, pp. 65–69), all cumulatively tending to show that Richmond and Connelly had the requisite knowledge and specific

[124] In 1938, the Tenth Convention of the American Communist Party described the Party press as "the indispensable instrument for realizing the present objectives and historic aims of the working class movement" (Ex. J, p. 17 [Tr. 1248–1249]). The "rapid expansion" of the Party's newspapers—including the *Daily Worker* and the *Daily People's World*—was said to be "[o]f equal importance and urgency with the recruitment of new members" (*ibid.*).

intent. Accordingly, their positions as editors no more immunize them from the consequences of their knowing complicity in the conspiracy than did the functioning in similar positions—on the *Daily Worker*—of the *Dennis* petitioners Davis and Gates.

IV

THE COMMISSION OF OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY, WITHIN THE LIMITATIONS PERIOD WAS ADEQUATELY PROVED

Among the overt acts allegedly committed "[i]n furtherance of" the conspiracy and "to effect the objects thereof" (R. 4–6) were two, Nos. 13 and 16 (R. 5), which petitioners concede to have occurred within the limitations period, *i. e.*, during the three years preceding December 21, 1951, the date of the indictment's return (Br. 105). They contend, however, that neither of these acts was of the type contemplated by the overt act requirement of the conspiracy statute [125] because neither, they say, can be properly said to have been committed in furtherance of the conspiracy or "to effect [its] object" within the meaning of the statute (Br. 187–215).

Before proceeding to consider the two specific overt acts in question in the light of petitioners' contention, it should be emphasized that these were not the only acts in furtherance of the conspiracy that were shown by the evidence to have occurred within the statutory period. On the contrary, the record is filled with in-

[125] 18 U. S. C. 371 (*supra*, p. 4). As we have pointed out (see fn. 110, *supra*, p. 92), since July 24, 1956, by virtue of Public Law 766, conspiracy to violate the Smith Act has again become punishable (as it was prior to 1948) without the necessity of proof of an overt act.

stances of such acts, the sufficiency of which for purposes of satisfying the statutory overt act requirement (had they been alleged in the indictment) we do not suppose petitioners would question. For example, the evidence shows that petitioners Yates and Schneiderman jointly prepared one of the study outlines used in the "Marxist Institutes" which the Party conducted during the years 1949–50 (see *supra*, p. 18, and Appendix A, *infra*, pp. 161–164).[126] Petitioner Lambert, for another example, presided over the 1950 expulsion proceedings involving witness Sutherland, at which was discussed the possibility of an early "revolution by bullets" as a result of "the Korean crisis" (*supra*, pp. 36–37). Again, petitioner Carlson, in 1949, in his capacity as "county organizer" for Los Angeles County, visited a class of one of the "Marxist Institute" schools as an observer of its proceedings (*supra*, pp. 57–58). For similar incidents, all occurring within the statutory period, see *supra*, pp. 18–19, 21–22, 31, 33, 39–40, 49, 53, 58, 67–68.

But even as to the two overt acts which were alleged as such and proven, and whose sufficiency is the subject of petitioners' present challenge, that challenge cannot be sustained.

Each of the overt acts in question consisted of the attendance at and participation in an admittedly Party-sponsored meeting by one of these petitioners. Both meetings were in the nature of "rallies" honoring the memory of Lenin, the hero of the Russian Revolution. These "Lenin Memorial Meetings", as they were called, were "open" meetings, not limited

[126] Yates, in fact, so admitted in her testimony at the trial (A. 396–397).

to Party members, and the evidence shows that they were heavily attended.[127] One of the meetings took place in January 1949 (A. 207), and the other in January 1950 (A. 203).

With respect to the 1949 meeting, the proof was that petitioner Steinberg was the Chairman of the affair and in the course of the evening "made several speeches." Sponsored by the Party's "Education Department" for Los Angeles County, and honoring the "25th anniversary of the death of V. I. Lenin, chief founder of the Soviet Union", the meeting was intended to "serve primarily as a protest against" the then-pending *Dennis* trial in New York City. Petitioner Dobbs was the principal speaker at the rally. See *supra*, p. 21.

The 1950 meeting (A. 203–207; Ex. 159A, p. 10) was similarly sponsored by the Education Department of the Los Angeles County Party (A. 204). Petitioner Schneiderman, the principal speaker at the affair, spoke on "the China situation"; among other things, he charged that this Government's sending of assistance to the Chinese Nationalist Government was part of a "cold blooded plot to make war on the Chinese people" (Ex. 159A, p. 10). The evening's program included "an appeal for funds" (A. 203).

These overt acts were in furtherance of the conspiracy and "to effect [its] object", within the fair intendment of the conspiracy statute. It was at such meetings as these that the Party was augmented and strengthened through the recruitment of new members

[127] The evidence indicates that there were in the neighborhood of 1,600 persons at each (A. 203, 207).

(Tr. 3763–3768). It was through such "front" issues and propaganda—such "bait" (A. 221)—that the Party sought to interest outsiders in its program, with the objective of winning, if not new members (A. 116–117, 161–163, 199–201, 220–221; Tr. 1584–1587, 4622), at least "passive allies", *i. e.*, "people who won't oppose them when they make the move and strike for power" (A. 200). Certainly it was an overt act in furtherance of the conspiracy to participate in public eulogies for the chief architect and guiding genius of the Russian Bolshevik Revolution, the revolution regarded by Communists everywhere as the "pilot" revolution to be duplicated at the earliest propitious time in this and the other countries of the world, and at the same time to join in a public registration of "protest" against the trial of the Party's leaders, all of whom were proved to have been co-conspirators in the same conspiracy with the accused at bar. The great majority of the so-called Marxist-Leninist classics—the principal medium through which the Party indoctrinates its members and recruits in its program of violent revolution—either were written by Lenin or purport to expound his teachings (see Appendix A, *infra*, pp. 151–162). In addition, the participation in a Party-sponsored rally at which an appeal is made for funds with which to finance the continuation of the Party's activities, the conspiratorial character of which is as forcefully demonstrated as it was in this case, is an act in furtherance of those activities and of the conspiracy which they evidenced.

Petitioners' assumption (Br. 188–189, 202–208) that in order for participation in such a Party-sponsored meeting to fulfill the overt act requirement of the statute the meeting's speakers must make overt appeals to those in attendance to overthrow the Government by force and violence is plainly without warrant. For the advocacy of such forcible overthrow is the very offense—the substantive offense—charged in the indictment as the object of the conspiracy. It has long been established that the overt act which the Government must prove in a conspiracy prosecution need not be "the very crime that is the object of the conspiracy." *Pierce* v. *United States,* 252 U. S. 239, 244; *United States* v. *Rabinowich,* 238 U. S. 78, 86. Indeed, it is settled that the act need not be criminal in character at all, and taken purely by itself it may be wholly innocent. *Braverman* v. *United States,* 317 U. S. 49, 53, and cases cited. Certainly, the overt act in a conspiracy trial need not partake of the character of the "act" in a treason prosecution which must, in itself, be an act of aid and comfort to the enemy. *Kawakita* v. *United States,* 343 U. S. 717, 736–9.

Hence, petitioners' repeated assertion that the meetings here involved were "lawful" meetings (Br. 202–208) is quite without relevance. The pertinent fact is that they showed that the conspiracy which the evidence established was, in the words of the Court of Appeals, still very much in the "field of action" (R. 126). More than this is not required. As observed in *Carlson* v. *United States,* 187 F. 2d 366, 370 (C. A. 10), certiorari denied, 341 U. S. 940, "[t]he overt act

merely manifests that the conspiracy is at work," and that it is neither a mental project still resting solely in the mind nor a fully-completed operation no longer in existence. As we have pointed out (*supra*, pp. 115–116), there was ample evidence of overt activity by the petitioners during the limitations period (1948 to 1951), and there can be no possible claim that the conspiracy had either not yet begun to manifest itself objectively or had already ended.

V

PETITIONERS WERE NOT DEPRIVED OF A FAIR TRIAL BY THE TRIAL JUDGE'S REFUSAL TO GRANT THEIR MOTIONS FOR A CONTINUANCE AND FOR A MISTRIAL

A. *The judge appropriately exercised his discretion in declining to grant the motion for a continuance based on the publication of the "Philbrick articles"*

From January 20 to February 7, 1952, the Los Angeles *Times* published in serial form Herbert Philbrick's *I Led Three Lives,* an account of this *Dennis* witness' experiences in the Communist Party as a confidential informant of the F. B. I. This series of articles, which was also simultaneously syndicated in other newspapers throughout the country, contained no mention of any of these petitioners. The closest that any of the articles came to even indirectly referring to petitioners was a reference in one article to the so-called "notorious Communist 11"—*i. e.,* the eleven defendants in the *Dennis* case—whose names appear in the instant indictment (not, however, in association with any such descriptive phrase) as alleged co-conspirators with these petitioners. On January 21,

1952—ten days before the date set for the commencement of the trial of this case (February 1)—petitioners moved for a continuance of the case to a date 60 days after the terminal date of the Philbrick articles. The motion was denied without opinion. Petitioners contend (Br. 296–298, 106–107) that the refusal to grant the requested continuance deprived them of a fair trial.

The granting or refusal of a continuance is a matter resting within the sound discretion of the trial court. *Avery* v. *Alabama,* 308 U. S. 444, 446, and cases cited. Petitioners, as the court below observed, "had ample protection against an inclusion of a juror affected by such a newspaper discussion by the voir dire and the use of peremptory challenge" (R. 133). Indeed, that the trial judge did not abuse his discretion in refusing a continuance, and that petitioners' concern as to the possibility of attaining an impartial jury as a consequence of the Philbrick articles was ill-founded, appeared affirmatively at the *voir dire* examination. All members of the jury panel were specifically questioned, at petitioners' request, as to whether any of them had either "read" or "seen" the articles in question (Tr. 61, 112). Only one panel member, Venireman Flanagan responded in the affirmative (Tr. 61),[128] and she was not among those finally selected to sit on the jury (Tr. 122–123, 179). Thus it affirmatively appears that as of the date of the *voir dire*

[128] Venireman Flanagan stated that she had seen the invitations to read the articles, as carried in the paper which syndicated them, but that she had not read any of the articles themselves (Tr. 61).

examination, February 1, 1952, no panel member who eventually sat on the jury had either read or seen any of the articles. While the articles continued for a few days beyond that date, *i. e.*, until February 7, 1952 (see *supra*, p. 120), that fact has no present relevance in the light of Judge Mathes' emphatic and repeated admonitions to the jury, commencing from the very beginning and continuing several times daily throughout the trial, that they were not to read anything about the case in the newspapers or listen to anything about it on radio or television, and that they were not to permit themselves to be influenced, in arriving at their verdicts, by anything whatever other than the evidence as it unfolded in the courtroom (see, *e. g.*, Tr. 25–26, 28, 29–31, 32–33, 53–54, 60, 104, 134–135, 138–140, 211–212).[129] It must be presumed that these exhortations were heeded by the jury. For only on the assumption that jurors heed the instructions of the trial judge is jury trial possible. Cf. *Holt* v. *United States*, 218 U. S. 246, 250–251; *Opper* v. *United States*, 348 U. S. 84, 95; *Finnegan* v. *United States*, 204 F. 2d 105, 110 (C. A. 8), certiorari denied, 346 U. S. 821.

[129] In emphasizing to the panel members the importance of deciding the case solely on the basis of the evidence, the judge pointed out to them that "if we could try these cases upon what the jury reads in a magazine or hears over television or sees in a newsreel or reads in the paper, it wouldn't be necessary for you to come down at all. We could just ask you to mail in your ballot as to whether or not the defendant is guilty or innocent. But that isn't competent evidence. * * * In order to have a jury that is absolutely impartial, we have to have people who can * * * decide the issue, not upon something they heard or read outside the court room, but upon the evidence adduced here in a lawful and competent manner" (Tr. 30–31).

B. *The refusal to declare a mistrial on the basis of the publicity given to the release by a Senate Committee of an FBI memorandum purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the Government was a proper exercise of discretion in the circumstances of this case*

Equally without merit is petitioners' contention (Br. 289–296, 107–111) that they were entitled to have a mistrial declared because of the publicity given to the release by a Senate committee of an FBI memorandum purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the Government. The pertinent facts are as follows:

On July 29, 1952, the Internal Security Subcommittee of the Senate Judiciary Committee made public a printed pamphlet in the form of a Committee Print, 82d Cong., 2d sess., entitled *Documentary Proof that the Communist Party, U. S. A., Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence.*[130] Contained in the pamphlet was a memorandum which the Director of the Federal Bureau of Investigation had a month previously, in June 1952, delivered to the Senate Subcommittee at its request. The FBI memorandum, which contained no mention whatever of any of these petitioners, consisted in the main of quotations from writings of Marx, Engels, Lenin, and Stalin and from published comments on those writings by American Communist

[130] Excerpts from the pamphlet (Ex. NF) appear at pp. 301–306 of the appendix to petitioners' brief in the Court of Appeals, which they have also filed with the Clerk of this Court.

leaders. These quotations and comments had all previously been received in evidence in this case.[131] The release of the pamphlet was attended by considerable newspaper, radio, and television publicity throughout the country, the FBI memorandum being referred to in some of the newspaper reports as a "long secret FBI report."

On the morning following the release of the pamphlet, the trial being then in its closing stages,[132] petitioners moved for a mistrial on the ground that the publication of the FBI memorandum "on the very eve of the case going to the jury" was "a deliberate attempt of the Department of Justice to influence the outcome of this trial" (Tr. 13519).[133]

The trial judge, while recognizing that it was "regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial" (*United States* v. *Schneiderman*, 106 F. Supp. 906, 926), refused to accede to petitioners' contention that the incident called for the automatic termination of the six-months'-old trial and the declaration of a mistrial. In the course of his thorough consideration of the

[131] See Tr. 13519, 13530, 13650–13651, 13654, 13665.

[132] The presentation of evidence had been concluded, and counsel were presenting their closing arguments to the jury.

[133] From the beginning, petitioners have made charges and insinuations that the release of the pamphlet by the Senate Subcommittee at the particular time it was released with reference to this trial was intentional on the part of the Subcommittee, and that its release at that time was with the connivance of the prosecution (Tr. 13526, 13652, 13667, 13680). These insinuations are repeated in their brief to this Court (Br. 108, 289, 290–292). They are, however, completely lacking in record support.

arguments advanced in support of the contention (Tr. 13519–13535, 13649–13719), he observed that, even assuming that one or more of the jurors had read or heard about the FBI memorandum in question, it contained nothing that was news to them, since the various quotations on which it was based were all in evidence and thoroughly familiar to them (see Tr. 13655, 13657–13658, 13660–13662, 13665–13666); that such statements, for example, as that

> [P]roletarian revolution is impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one,

which the memorandum attributed to Stalin, could hardly have had any great effect on the jury, since they had "heard that read here several times in the last six months" (Tr. 13665). He said that, while "[o]f course, we would like to have nothing mentioned in the press or anywhere else that could possibly influence even the community while a case such as this is under way", it must nevertheless be recognized that "the world can't stop while the trial goes on" (Tr. 13667). He pointed out to defense counsel that "you gentlemen for the defense have brought out time and time again that two members of the Federal Bureau of Investigation sit there at the government counsel table throughout this trial", and asked whether they, defense counsel, "suppose[d that] any member of the jury would be naive enough to believe that J. Edgar Hoover, the head of the Federal Bureau of Investigation, has contrary ideas to what was being urged by the government" (Tr.

13669). "I ask you again", he said, "do you suppose it could possibly be any surprise to this jury that the Federal Bureau of Investigation contends that the Communist Party so advocates [*i. e.*, the violent overthrow of the Government]" (Tr. 13665). "When the matter was presented yesterday morning", the judge further remarked, "I thought there was possibly something new. I hadn't seen the [newspaper] article, but when I read the article, I didn't see anything at all in it that any person in this court room who attended this trial wouldn't recognize as having been read here, not once, but several times. * * * And the thought occurred to me that of all the people in this community who would be least affected by that article, the jury would be and the counsel and the court in this case who sat here for several months hearing that sort of thing read, and to whom it would be no news whatever" (Tr. 13666).

While for these reasons the judge was convinced that the incident in question did not warrant the declaration of a mistrial, he nevertheless expressed his willingness, if petitioners desired that he do so, to question the jurors as to whether any of them had either read or heard anything about the FBI memorandum or its contents, and, if so, whether any juror felt in the slightest degree unable to base his verdict in the case solely and exclusively on the evidence adduced in the courtroom (Tr. 13710, 13712, 13714, 13716–13717).[134] The judge's plan was that, in the

[134] The judge observed that "[t]he question isn't whether they have heard it. It is what effect it has had upon them. * * * [The purpose of the inquiry would be] to invite them in effect to dis-

event that any juror or jurors indicated an inability to decide the case solely on the evidence, he or they would be excused from further participation in the case and be replaced by the necessary number of alternate jurors, of whom there were four available (Tr. 13717).

Petitioners, however, firmly rejected this offer. They insisted that only a single inquiry be made, *viz.*, whether any juror had read or heard about the matter; if the answer should be in the affirmative, they maintained, the judge would be required automatically to declare a mistrial (Tr. 13716, 13717–13719). When the judge declined to accede to this suggestion, the matter was dropped,[135] and the judge made no mention of it in his instructions other than to repeat the admonition which had been given the jury throughout the trial, that they were under a sworn duty to base their verdicts solely upon the evidence in the case as adduced in the courtroom (Tr. 13729, 13732, 13770; *United States* v. *Schneiderman*, 106 F. Supp. at 927, 928, 940).

In the light of the actual contents of the FBI memorandum and the circumstances attending its publication as just set forth, petitioners' contention that the trial judge had no choice but to declare a mistrial is, we submit, clearly untenable. As observed by the

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qualify themselves if they feel they cannot go ahead with an open mind as heretofore and decide the case solely upon the evidence produced here in the court room" (Tr. 13713).

[135] The judge observed to defense counsel: "I do not think we should conduct the inquiry if you do not wish the second question put. There is no point in it that I can see. It would be merely a disturbing influence upon the jury at this stage" (Tr. 13718).

court below, "[u]nquestionably, the matter [contained in the memorandum] was of immense public interest and was within the public domain. The media of publication had a right to publish" (R. 134). Jurors' knowledge of publicity adverse to a defendant does not create any presumption of prejudice on their part against him. *Holt* v. *United States*, 218 U. S. 245, 250–251; *Finnegan* v. *United States*, 204 F. 2d 105, 110 (C. A. 8), certiorari denied, 346 U. S. 821; *United States* v. *Moran*, 194 F. 2d 623, 625 (C. A. 2), certiorari denied, 343 U. S. 965; *United States* v. *Katz*, 173 F. 2d 116, 117 (C. A. 3); *Shushan* v. *United States*, 117 F. 2d 110, 115–116 (C. A. 5), certiorari denied, 313 U. S. 574. It was most unlikely, furthermore, for the reasons stated by the trial judge (*supra*, pp. 125–126), that any juror, even assuming that some of them had read or heard about the memorandum, would have been influenced by it to the extent of an actual impairment of his ability to reach a verdict solely on the basis of the evidence adduced in the courtroom. The most that petitioners could reasonably ask was that the judge do what he offered to do, *i. e.*, make to the jury the compound inquiry to which we have referred (*supra*, p. 126). The single inquiry on which petitioners insisted—whether any juror had read or heard of the memorandum—was not the test of ability to continue to serve as a juror; the test was rather whether, if any juror had heard of it, he was influenced by it to such an extent as to interfere with his ability to decide the case on the evidence alone. For this reason there was no warrant for petitioners' refusal to ac-

quiesce in the judge's suggested disposition of the matter.

The very same contention which petitioners here advance was also made, unsuccessfully, in *United States* v. *Flynn*, 216 F. 2d 354, 374–375 (C. A. 2), certiorari denied, 348 U. S. 909. That case involved the same pamphlet. It is true that it affirmatively appeared in *Flynn*, as the result of questioning the jury, that no juror had read the pamphlet (*id.* at 374), but, as the Second Circuit's opinion points out, there was no indication that the members of the jury had not read the newspaper reports concerning it, since the trial court had specifically excluded from its inquiry the question of whether any of them had read these reports (*ibid.*, note 14). Circuit Judge (now Mr. Justice) Harlan observed that, even though the pamphlet itself mentioned two of the *Flynn* defendants by name (*id.* at 374, 376), the fact that the newspaper reports contained no reference to the *Flynn* case or to any of the defendants therein, together with the strong charge by the trial court that the jury must not be influenced by anything except the evidence in the case, provided ample guarantee that no defendant had suffered prejudice by the publicity given to the pamphlet's release (*id.* at 374, note 14).

Each of the factors to which Mr. Justice Harlan pointed as affording assurance that no substantial right of any of the accused had there been prejudiced is likewise present here. The publicity attending the pamphlet's release contained no reference either to this case or to any of these defendants, and the trial

judge stressed that the jury must not be influenced by anything except the evidence in the case (see *supra*, pp. 122, 127). Indeed, the pamphlet itself did not mention any of these petitioners, although it did, as we have said, refer to two of the *Flynn* defendants. And here, as we have pointed out (*supra*, pp. 126–127), we have the additional fact of the trial judge's offer, which petitioners rejected, to query the jury as to whether any of them had heard or read anything at all about the matter in question and, if so, whether they still felt able to decide the case on the evidence alone.

Petitioners' argument that they were entitled to nothing short of an immediate declaration of a mistrial is bottomed on the premise that all of the organs of government, which have a general duty to publish facts affecting the public interest (particularly during such a period as the Communist aggression in Korea in 1952), were required to remain silent with respect to all aspects of the Communist question during their trial. There is no warrant for any such assumption.[138]

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[138] The situation at bar was totally unlike that in *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1), cited by petitioners (Br. 293, 297–298). There, for several months immediately preceding the accused's trial the newspapers and other media of publicity in the city of trial printed day-to-day "flamboyant, front-page" news accounts of testimony given before a congressional subcommittee inquiring into the very issues on which the accused was tried, with the result that, in the words of the First Circuit, "[i]t is fair to say that, so far as the modern mass media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges" (*id.* at 111). The situation in *Delaney* was further aggravated by the fact that the testimony heard by the subcommittee "ranged far beyond matters relevant to the pending indictments", including such matters as

Judge Mathes was clearly correct, we submit, in concluding that "[t]here has been no showing that the jury at bar did not function as a jury should function, free from all extraneous influence, in the best tradition of this outstandingly characteristic institution of the Anglo-American legal system. And the presumption is that the jurors faithfully performed their official duties." *United States* v. *Schneiderman*, 106 F. Supp. 906, 926.

VI

PETITIONER SCHNEIDERMAN'S PROSECUTION WAS NOT BARRED BY THIS COURT'S 1943 DECISION SETTING ASIDE HIS DENATURALIZATION

In his separate brief, petitioner Schneiderman erroneously argues (Br., No. 7, pp. 34–65) that his prosecution and conviction in this case were barred, under the principle of *res judicata*—or collateral estoppel, as it is more accurately referred to when it is sought to be applied to a situation like that here involved [137]—by this Court's 1943 decision in *Schneid-*

allegations of bankruptcy, larceny, embezzlement, and fraud by the accused occurring prior to his appointment as collector of internal revenue, all of which was given full play in the various media of publicity (*id.* at 110). *Delaney*, in brief, involved a "trial by newspaper" (*id.* at 113) occurring on the very eve of the accused's judicial trial. It is evident from what has been said in the text that nothing remotely resembling that was here involved.

[137] "The general rule of *res judicata* applies to repetitious suits involving the same cause of action. * * * The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or

erman v. United States, 320 U. S. 118, in which the Court set aside the decree of denaturalization previously entered against him in that proceeding.

The determination of fact which the jury made against Schneiderman when they returned their verdict in the present case was not inconsistent with what this Court determined in the earlier *Schneiderman* case. The only question involved there was whether the Government had sustained its burden of proving by "clear, unequivocal, and convincing" evidence that Schneiderman was not, on the date of his naturalization in 1927, and had not been during the preceding five-year period, attached to the principles of the Constitution and well disposed to the good order and happiness of the United States (320 U. S. at 121, 135, 158–159). The issue before the jury in the instant case, on the other hand, was whether Schneiderman had been, from December 1948 to December 1951, a knowing member of a conspiracy to teach and advo-

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demand, but as to any other admissible matter which might have been offered for that purpose.' * * *

"But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. * * * In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment or collateral estoppel." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597–598.

cate the duty and necessity of forcibly overthrowing this Government and to organize as the Communist Party a society of persons so teaching and so advocating.

Not only are the critical time-periods in the two cases some 20 years apart,[138] but, what is more important, this Court made very clear in *Schneiderman* that it was not passing upon, because it found it unnecessary to pass upon, the question of whether the Communist Party at that time taught and advocated, or had ever taught and advocated, the forcible overthrow of this Government (320 U. S. at 147–148, 153). "This Court has never passed upon the question whether the Party does so advocate", said the Court, "and it is unnecessary for us to do so now" (320 U. S. at 148). "We do not say", the Court further emphasized, "that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here" (*id.* at 153). The issue, said the Court, was whether Schneiderman had been shown, by the strict standard of proof which the Court held necessary, to have been *personally* lacking in the essential requisites for naturalization during

[138] In addition to the proliferation of Communist literature since 1927, referred to in fn. 139, *infra*, p. 134, we now have the advantage of all the history which began with the German-Soviet pact in 1939, and particularly of the activities of the Communists, both here and abroad, since the close of hostilities in World War II. Our general knowledge of, and experience with, Communist actions and policies is far more ample today than in 1927, or even 1943.

the five-year period ending in 1927. It is true that the Court, in making this determination, examined portions of the Marxist-Leninist literature in existence during that period [139] because Schneiderman had testified that he subscribed generally to their philosophy and principles (see 320 U. S. at 127, 136–137). And it is true that on the basis of this examination a majority of the Court felt it to be a "tenable conclusion" that the Party, "in 1927" (*id.* at 157),—

> * * * justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of

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[139] The literature published after 1927, the Court pointed out, was "entitled to little weight" by virtue of its having been published "after the critical period" (320 U. S. at 151–152; see also *id.* at 147). The Court thus virtually excluded from its consideration the entire body of Communist literature published in the 12-year period between the date of Schneiderman's naturalization and the commencement of the denaturalization proceedings in 1939. The jury in the case at bar, on the other hand, had the advantage of being able to consider not only the pertinent literature of the latter period but also the literature of the period of equal duration which elapsed between the institution of the denaturalization proceedings and the trial of the instant indictment. In addition, of course, this Court did not have before it such strongly probative evidence of what the Party teaches as the curricula of its schools and classes in the post-World War II period (see Appendix A, *infra*, pp. 149–164), all of which was available to and considered by the jury in this case. Regardless, therefore, of whether the conclusions of the majority in *Schneiderman* as to the nature of the Party's teachings concerning force and violence were or were not "naive" (as Mr. Justice Jackson, concurring in *Dennis* v. *United States*, 341 U. S. 494, 569 [note], described them), they are at least "of yesterday" (*Carlson* v. *Landon*, 187 F. 2d 991, 997 (C. A. 9), affirmed, 342 U. S. 524).

peculiar circumstances constitutional or peaceful channels were no longer open.

But the Court was at pains to emphasize that it was not holding, and did not wish to be understood as believing, either that this was "the most probable" "interpretation of the Party's attitude toward force and violence" or that Schneiderman's testimony in that case was "acceptable at face value" (*id.* at 158). Rather, the Court said (*id.* at 158–159),—

> * * * We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding * * * is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation.[140]

The narrowness of the issue decided in the 1943 *Schneiderman* case is thus apparent. The Court did not decide that the Communist Party did not then teach and advocate, or that it had never taught and advocated, the forcible overthrow of the Government. Nor did the Court decide that such teaching and advocacy was not, or that it had never been, a tenet of Marxism-Leninism. It did not even decide, affirmatively, that Schneiderman was, during the relevant 1922–27 period, attached to the principles of the

[140] For overt acts of Schneiderman established by the evidence in this case, showing his thorough understanding and complete acceptance of the Party principle of the duty and necessity of overthrowing this Government by force and violence, see *supra*, pp. 58–65.

Constitution and well disposed to the good order and happiness of the United States. All that was decided was the negative fact that the Government had failed to prove, by the requisite standard of "clear, unequivocal, and convincing" evidence, that Schneiderman was not so attached and so disposed during the critical years preceding his naturalization. Cf. *Lewis* v. *Frick*, 233 U. S. 291, 302.

There is thus no inconsistency whatever between what the *Schneiderman* case decided and what the jury's verdict against him in this case established, *viz.*, that from 1948 to 1951 he was a knowing party to a conspiracy of the type charged in the indictment. Consequently, the principle of *res judicata*, or collateral estoppel, did not bar Schneiderman's prosecution. For this Court's decision in the *Schneiderman* case was not "a determination favorable to" him "of the facts essential to [his] conviction" in the instant prosecution—the only proper test of that principle's applicability in a given situation. *Sealfon* v. *United States*, 332 U. S. 575, 578–579.[141]

[141] See also, to the same effect, *United States* v. *Williams*, 341 U. S. 58, 63–65; *Commissioner* v. *Sunnen*, 333 U. S. 591, 597–598.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

THE HISTORY, AIMS, TECHNIQUES, ACTIVITIES, AND TEACHINGS OF THE COMMUNIST PARTY OF THE UNITED STATES (INCLUDING THE CALIFORNIA PARTY)

ORIGIN AND EARLY HISTORY OF THE PARTY

The Communist Party of the United States was first organized in September 1919 (Ex. 622, p. 16) following the successful 1917 Bolshevik Revolution in Russia. In the course of its growth, it has been in a continuous process of organization and reorganization, adopting different names from time to time. Originally "an underground Party", it organized what it called the "Workers Party" in December 1921 "as its legal expression" (William Z. Foster, *From Bryan to Stalin* [Ex. 145], p. 295 [A. 521][1]). "The Communist Party itself, however, continued to exist as an underground Party, it being commonly referred to as 'Number one', while the Workers Party was 'Number two', until the underground Party was finally liquidated at the end of 1923" (*ibid.*).[2] In 1927, the Party changed its name to the "Workers' Communist Party" (Ex. MM–1, p. 93), and in 1929 it again changed its name—to the one it now bears (*ibid.*; Tr. 11414). Finally, for a short period in 1944–1945 it once again changed its name, this time to the "Communist Politi-

[1] Where an exhibit or a part of an exhibit which we cite is also reproduced in the printed record, the page or pages of the printed record at which it appears will be added in brackets following the exhibit-reference itself.

[2] That, however, the Party later renewed its "underground" activities—particularly in the 1930's (see *infra*, pp. 139–140) and again following World War II (see *infra*, pp. 170–174)—is clear from the evidence in this case.

cal Association" (see *infra*, pp. 144–145). Following this interlude, it changed its name back to the "Communist Party of the United States" (*infra*, pp. 145–147), by which name it has been known ever since.

Several of these changes in name have been associated with factional struggles within the Party, with the victorious ousting the vanquished for some claimed deviation from the principles of "Marxism-Leninism",[4] and with an accompanying reorganization of the Party. Thus, Party leaders Jay Lovestone and Benjamin Gitlow, together with all their adherents, were ousted in 1929 following the "Open Letter" from the Communist International condemning their "Right errors" and the theory of "American 'exceptionalism'" (Ex. 622, pp. 19–20; Ex. 83, p. 806), and Earl Browder was expelled in 1945 in conjunction with the reorganization of the Party following the period of the "Communist Political Association" (see *infra*, pp. 144–147).

THE 1930's AND THE YOUNG COMMUNIST LEAGUE

Many of the petitioners started their Communist Party careers in the 1930's or earlier as members of the Young Communist League, the former name of the youth affiliate of the Communist Party (Ex. 485, p. 8; A. 258).[5] Many of the League's meetings were

[3] The Party, in its official theoretical organ, *Political Affairs*, has referred to September 1, 1949, as its "[t]hirtieth [a]nniversary" (Ex. 622, p. 1).

[4] For a summarization of some of the more pertinent of these principles, see *infra*, pp. 149–164.

[5] Petitioner Schneiderman was a member of the League in the 1920's (see *supra*, p. 59), and petitioners Steinberg (A. 246–247), Stack (A. 213–219), Spector (A. 243–244), Lambert (A. 262–264), Dobbs (A. 10–11, 258), Healey (Dorothy Healey Connelly) (A. 243, 263), Carlson (A. 11, 246, 262–264), and Richmond (A. 211–212) were all officers or members of or otherwise active in the League in the 1930's.

conducted in strictest secrecy because, as witness Rosser explained, the League "was a secret organization underground conspiring at that time" (A. 264; see *supra*, pp. 27–28). And what it was "conspiring" about was explained by the same witness. "The major concern of the Communist Party" in the early 1930's, he testified, "was to bring about a revolution"—"the violent overthrow of this Government" (A. 262).

THE SAN FRANCISCO GENERAL STRIKE OF 1934

For a period of four days extending from July 16 to July 19, 1934, the City of San Francisco and the entire surrounding Bay area were immobilized by a general strike.[6] The theoretical organ of the Communist Party of the United States, at that time called *The Communist*, contained an article in its October 1934 issue (described on the cover as the "Special Strike Issue") claiming credit for the Party for the bringing about of this strike (Ex. 738, pp. 985–1004

[6] For details concerning this strike, see the article on the *San Francisco General Strike* in Funk & Wagnalls' *The New International Yearbook* for 1934, pp. 674–675. The strike was the climax of a longshoremen's strike which, commencing May 9, 1934, "soon spread to the whole Pacific coast and completely crippled the operations of all ports" (*id.*, p. 674). It has been described as "[o]ne of the most significant labor disputes in the American industrial annals" (*ibid.*). General Hugh Johnson, the NRA Administrator, speaking at the scene of the strike, called it "civil war" and "bloody insurrection" (*id.*, p. 675). Though the original longshoremen's strike, out of which the general strike grew, was an A. F. of L. affair (*id.*, p. 674), President Green of the A. F. of L. disavowed the general strike, stating that "the American Federation of Labor neither ordered the strike nor authorized it" (*id.*, p. 675).

[see A. 607–610]).[7] The article, entitled *The San Francisco Bay Area General Strike*, was written by Sam Darcy, who ten years later was to be described by the Party's National Chairman, William Z. Foster, as one of the "40 leading Party members" (A. 575).

"We are discussing", the article begins, "the largest single strike in the history of the country" and "the first general strike in which * * * our Party participated as a Party" (Ex. 738, p. 985 [A. 607]). After pointing out that "in a revolutionary situation" the object of a general strike is to "seiz[e] the industries and eliminat[e] all capitalist control" (*ibid.* [A. 608]), the article states that "[t]he San Francisco General Strike" was "incomplete" due to the Party's failure to "stop the bourgeois newspapers" and to induce "the workers in the communication systems * * * to join the strike" (*id.*, pp. 985–986 [A. 608]). Attributing these failures to faulty organizational work on the part of the Party (*ibid.* [A. 608]), the article observes that "[h]ad we succeeded in bringing these communication workers out on strike, the entire struggle would have reached a higher political level" since the very "ability of the capitalist State to function" would have been rendered doubtful (*id.*, p. 986 [A. 608–609]). The article goes on to tell of the "long and careful preparation" which the Party made for

[7] Additional evidence of the Party's role in engineering this strike, which was offered and received, however, only as against petitioner Schneiderman (Tr. 7690–1691), is set forth at pp. 60–63, *supra*. That evidence indicates that the American Communist Party, in bringing about the strike, was acting pursuant to instructions from the Communist International, issued following a meeting in Moscow attended and participated in by Schneiderman as the American Party's delegate to the Seventh World Congress of the Communist International.

the strike, particularly in the "key industries"[8] (*id.*, p. 989 [A. 610]). It describes the strike's "political" objective, which was in fact the "dominant" one, of "compel[ling] the Government to withdraw all [its] forces (*id.*, pp. 986–988 [A. 609]); points out that, while the strike "was not a revolution", it nevertheless had given Party members a "clear glimpse of how the struggle for power develops under the peculiar circumstances that obtain in the United States" (*id.*, p. 988 [A. 609]); and characterizes the strike as a "milestone in the revolutionary development of the American working class", the lessons of which "must be grasped by every member of the Communist Party" for future use (*id.*, p. 1003 [A. 610]).

That the Party still regards the 1934 San Francisco General Strike as a "rehearsal for seizure of power" (see *supra*, pp. 62, 63) is indicated by Party official Ida Rothstein's[9] reference to it in 1946 as "the closest thing to the Paris Commune[10] that has ever happened in this country" (A. 154). This observation was made at a club meeting in San Francisco at which Lenin's *The Paris Commune* (Ex. 492) was being discussed (A. 153–155; Tr. 4425–4428). The remark

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[8] See *infra*, pp. 171–177, for a key discussion of the Party's policy of concentrating its forces in "key" or "basic" industries, defined as "those upon which the whole economic system depends", and the reasons for this policy.

[9] Miss Rothstein has been a Party teacher (A. 223–224) in addition to her many other duties as a Party functionary (see, *e. g.*, A. 221–223, 283–285, 416–417; Tr. 4425–4429, 5438–5444, 5450–5453). She succeeded petitioner Fox as Chairman of the "Haskell section" of the Party in 1949 (A. 283).

[10] For details concerning the Paris Commune—the name given to the insurrectionary government of French Communists who seized and held power in Paris from March 18 to May 28, 1871—see 4 *The New Larned History* (1923 ed.), pp. 3448–3449; *Encyclopedia Britannica*, "Commune". See also Lenin's *The Paris Commune* (Ex. 492).

was occasioned by the following passage from this work of Lenin's (Ex. 492; p. 47 [A. 542–543]):

> I beg respectfully to remind Mr. Kautsky,[1] who knows Marx and Engels by heart, of the following evaluation of the Commune by Engels from the point of view of "pure democracy":
>
> "Have these gentlemen (the anti-authoritarians) ever seen a revolution? Revolution is undoubtedly the most authoritative thing possible. It is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, *i. e.*, by highly authoritative means * * *. Would the Paris Commune have lasted a single day had it not relied upon the authority of the armed people against the bourgeoisie? Are we not, on the contrary, entitled to blame the Commune for not having made sufficient use of this authority?"

After reading the foregoing passage to the assembled group (A. 153–154), Miss Rothstein (A. 154–155)—

> * * * mentioned that the closest thing to the Paris Commune that has ever happened in this country was the 1934 waterfront strike; that here was an example where labor held power for a period of two or three days, and had the political development of the people been advanced, had the party laid a proper background and proper foundation of education among the masses, that an incident like that can be transferred into the revolutionary period; that you can go from a strike into a revolutionary action without too much difficulty.

She added that when a similar opportunity arises in the future, the Party should be "better prepared for action" (A. 155).

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[1] Karl Kautsky, a German political opponent of Lenin who favored working toward the establishment of socialism by parliamentary means.

THE "COMMUNIST POLITICAL ASSOCIATION" INTERLUDE OF 1944–1945

In 1943—the German armies being at the time still deep in Soviet territory on the Eastern Front and intensive preparations being under way for the opening of a Western Front—the Communist International proclaimed itself "dissolved" (Ex. MN, p. 42). On the heels of this development, in early 1944, steps were taken in this country to change the Communist Party of the United States into a so-called "political association" of Communists claiming to be dedicated to the furtherance of the interests of the United States through a policy of cooperation with all "progressive" forces (Ex. 443, pp. 3, 4; Ex. 42, pp. 656–672). This policy required that the Party's avowed adherence to the program and tenets of "Marxism-Leninism"—which call for a strong Communist Party as a "vanguard" to lead the "workers" in a class war with "capitalists" and the establishment of a "dictatorship of the proletariat" following forcible overthrow of all "bourgeois" governments (see *infra*, pp. 149–164)—be subordinated to the declared objectives of the new Party program. Accordingly, in May 1944, under the leadership of Earl Browder, the Party held a national convention at which it "dissolved" itself (Ex. 443, p. 3) and immediately proclaimed itself the "Communist Political Association" of the United States (Ex. 42, p. 664). This was to be a "new non-party organization" which, while "adher[ing] to the principles of scientific socialism, Marxism", was to be "shaped by the needs of the nation at war" and dedicated to the "common cause of the progressive majority of the American people" (*ibid.*; Ex. 443, p. 3).

The "Communist Political Association" thus inaugurated was to remain in effect a little over one

year before it in turn was to be dissolved and the "Communist Party" reconstituted.

THE 1945 RECONSTITUTION OF THE COMMUNIST PARTY

In April 1945, as the war in Europe was coming to an end, *Cahiers Du Communisme*, the theoretical organ of the Communist Party of France (Ex. 42, p. 656), carried an article by French Communist leader Jacques Duclos (*id.*, p. 590) entitled *On the Dissolution of the Communist Party of the United States* (*id.*, pp. 656–672). The article condemned the Browder program of class peace, embodied in the Communist Political Association, as constituting "notorious revisionism", violating the most fundamental principles of Marxism-Leninism (*id.*, p. 670).[12] The publication of this article triggered a swift reversal of Party policy in this country. The article was pub-

[12] Among other things Duclos' article discussed and quoted extensively from what has come to be known as the "Foster letter", which had been suppressed by the National Board of the Communist Party shortly prior to the Party's "dissolution" a year previously (Ex. 42, pp. 660–663). In this letter, dated January 20, 1944, and addressed to the National Committee, Foster, the then National Chairman of the Party, had expressed doubts concerning Browder's program of class peace (*id.*, pp. 640–654). The appearance of a dissenting voice led to the hasty convening of the top Party officials at an "enlarged" meeting of the National Board on February 8, 1944, to consider the situation created by Foster (*id.*, p. 655). All present voted against Foster's position, except Foster himself and one other (*ibid.*), the latter being shortly thereafter expelled from the Party (*id.*, p. 663). It was decided at the meeting that Foster's letter should be "suppressed", *i. e.*, concealed from the general membership, and this was done (Ex. 55, pp. 792, 830). Foster later explained that he had submitted to the suppression of his letter in the interest of Party unity and to avoid expulsion (*id.*, p. 792). His task during this period as he saw it, he said, had been "to keep the C. P. A., in fact, if not in name, the Communist Party" (Ex. 42, p. 655).

lished here shortly after its appearance in France (*id.*, pp. 656–672) and Party leaders began a series of resolutions and statements echoing Duclos' criticisms. The upshot of it all was the "reconstitution" of the Communist Party at a special national convention held for that purpose from July 26 to 28, 1945 (*id.*, pp. 579–590, 629–632; Ex. 55, p. 782; A. 55).

The convention was attended by petitioners Stack, Lima, Healey, Schneiderman, and Richmond (A. 44–45, 73), as well as by most if not all of the *Dennis* defendants (A. 46–52). Meeting as the Communist Political Association on the first day (A. 55), the Association "dissolved" itself and "the same delegates", after "reconstitut[ing] themselves as delegates of the Communist Party", "voted to reconstitute the Communist Party" (A. 55, 73).[13] Addressing the convention, alleged co-conspirator Foster castigated Browder as having been preaching, under the aegis of the Communist Political Association, "anti-Marxism", and he quoted Duclos' statement that the Browder program had been a "notorious revision of Marxism" (Ex. 55, p. 784). "[U]nder the false flag of a Marxism brought up to date", said Foster, Browder had been "making a head-on attack upon the whole body of Marxist-Leninist principles", as was clear from his "often-expressed scorn for the 'old books' and 'old formulas', by which, of course, he means Marxist-Leninist books and formulas" (*ibid.*). These "Marxist-Leninist classics", said Foster, instead of being "throw[n] away", as Browder would have it, must form the very basis of the reconstituted Party (*ibid.*). A new constitution was accordingly adopted which proclaimed in its preamble that the Party "bas[es]

[13] The "California delegates", according to witness Lautner, were "the noisiest * * * in demanding the immediate reconstitution" of the Party (A. 72–73).

itself upon the principles of scientific socialism, Marxism-Leninism" (A. 57). When some one asked from the floor of the convention where in the preamble "the principle of [the] dictatorship of the proletariat" was to be found, alleged co-conspirator Eugene Dennis replied, "It is there. * * * Even the blind can see it" (A. 56–57).

THE CENTRAL IMPORTANCE OF MARXISM-LENINISM IN THE RECONSTITUTED PARTY

"As never before", reported Party leader Foster to the 1945 reconstituting convention, "we must train our Party in the fundamentals of Marxism-Leninism" (Ex. 55, p. 788). "[T]he study * * * of Marxist-Leninist theory and its application to the conditions of the United States", reported National Secretariat member John Williamson (Ex. 120, p. 1058) to a 1945 post-convention meeting of the National Committee (*id.*, p. 1109), must be made the subject of "an organized campaign throughout the Party" (*id.*, p. 1122). "[N]ew and old members" alike, stressed Eugene Dennis in a speech delivered at another National Committee meeting (A. 600),—

> * * * must acquire a new and more profound grasp of the theory and lessons to be learned from such Marxist classics as the *Communist Manifesto*, Lenin's *Imperialism*, Stalin's *Foundations of Leninism*, * * * and the *History of the C. P. S. U.*[34]

"[W]e—all of us", he said, "must live and breathe the science of Marxism" (*ibid.*).

"[D]irective[s]", accordingly, were issued "from party headquarters in New York" ordering "study

[34] Relevant selections from these and other Marxist-Leninist classics—selections made by the Party itself in the study-outlines used in its schools and classes—may be found at pp. 151–163, *infra*.

circles to be set up" for the training and retraining of Party members "along the lines of Marxism-Leninism." (A. 197).[15] This program of "systematic and organized education and self-study" was to be carried out under the guidance of the various Party clubs throughout the country as well as of the governing "Party Committee[s]" at the "Section" and "County" levels (A. 568).

The new Party line, as thus laid down, was widely promulgated throughout the California Party. Petitioners Yates, Stack, Lima, Lambert, Healey, Carlson, and Schneiderman were among those who attended the 1945 State Convention at which the new line was proclaimed (A. 14–16, 127–131). At the San Francisco session of the Convention, Schneiderman told the delegates that the Party was "going back" to the "fundamental" books of "Marxism, Leninism and Stalinism" and that they should "build [their] libraries" on these classics (A. 15). At the Los Angeles session, petitioner Healey, stressing that "the future of the party [would] be militant", urged the "re-education of all Marxists" (A. 131). Petitioner Stack likewise urged the "reinstitut[ion]" of the old "Marxist-Leninist rules" (A. 130), and petitioner Yates, in a speech at a 1946 Party meeting attended by petitioners Steinberg, Spector, Kusnitz, Dobbs, and Healey among others, emphasized that "only through Marxist-Leninist training" would it be possible to achieve a "Soviet * * * type of government" "all over the world"[16] (A. 136). See also A. 135, 138, 145, 584; Ex. 329, p. 4.

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[15] For the curricula of these study groups, see *infra*, pp. 149–164.

[16] For further details of this speech of Yates', see *supra*, p. 17.

MARXISM-LENINISM, AS TAUGHT IN PARTY SCHOOLS—THE NECESSITY OF FORCE AND VIOLENCE IN THE "PROLETARIAN REVOLUTION" WHICH IS TO EVENTUATE IN THE "DICTATORSHIP OF THE PROLETARIAT"

"Marxism-Leninism" was described by witness Lautner, the head of the Party's New York State "Review Commission"[47] until his explusion from the Party in 1950 (A. 52–53), as comprehending "the sum total" of the "teachings, policies and program of the Communist Party" and "Communist [International]", as "taught and advocated by the foremost exponents of Communism"—"Lenin, Stalin, Marx, [and] Engels" (A. 70). The writings of these "foremost exponents", many of which are in evidence in this case, are frequently referred to as the Marxist-Leninist "classics" (A. 36–37, 321, 414).

From 1946 to 1950, the California Party, in accordance with the national policy laid down at the 1945 reconstituting convention (*supra*, pp. 146–147), conducted a series of schools and classes in which Party members and recruits were indoctrinated in the fundamental principles of Marxism-Leninism (A. 33–34, 38–39, 57–61, 84–85, 97, 107–108, 175, 182–184, 196–199, 297–298, 302, 397, 431–433; Ex. 204). The Party also arranged for the sale and distribution of the Marxist-Leninist classics for self-study by members and recruits (A. 36–37, 190–192, 196–199, 278, 289, 316, 320–321, 413–414). Members who occupied Party positions of responsibility even at the club level were required to be especially well-grounded in Marxist-Leninist fundamentals (A. 201–202, 310–312, 315, 377–378, 586–587).

The nature and content of Marxism-Leninism was established at the trial by documentary evidence con-

[47] The disciplinary and security body of the Party in New York (A. 53–54).

sisting of typed study-outlines designed for self-study and class use.[18] These study-outlines, which consist to an important extent of assigned readings in the Marxist-Leninist classics, fall into two groups.

The *first* group (discussed *infra*, pp. 151–161) consists of three substantially identical outlines[19]—Exhibits 93, 626, and 613 (reproduced in part at A. 612–620)—issued, respectively, by the Party's "National Educational Commission" (A. 612), its California "State Educational Committee" (A. 619), and its Los Angeles County "Educational Committee" (A. 620). They were used in Party schools and classes throughout California following the 1945 reconstitution of the Party (A. 33–34, 175, 431–433; Tr. 3866–3867).[20] While the evidence does not affirmatively show their use in California later than 1946, it does show that Exhibit 93—the outline issued by the Party's National Educational Commission—was used in New York at least as recently as 1950 (A. 61, 53).

The *second* group of outlines (discussed *infra*, pp. 161–164)—Exhibits 163, 450, 201, 213, and 214 (reproduced in part at A. 620–635, 639–640)—was used by the California Party in schools and classes called "Marxist Institutes" which the Party conducted in San Francisco and Los Angeles during 1949 and 1950 (A. 84–85, 96–98, 107–108, 297–298, 396–401; Tr. 2835–2837, 3549). One of these, Exhibit 163, was prepared by petitioner Yates in collaboration with petitioner Schneiderman (A. 397).

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[18] In addition to testimony as to oral teachings by Party instructors (*e. g.*, A. 57–61, 193–195, 244–245).

[19] For the nature of the few minor differences, see A. 431–433, 619–620.

[20] One of the outlines, Exhibit 93, is the same outline as that introduced (as Exhibit 9 x Z) in the *Dennis* case. Its contents are summarized at pp. 117–140 of the Government's brief in this Court in that case (No. 336, Oct. Term, 1950).

The first group of outlines.—Lesson I of the first group of outlines (Ex. 93, pp. 1–3; Ex. 626, pp. 1–3; Ex. 613, pp. 1–3) treats of "Marxist-Leninist Theory" (Ex. 626, p. 1). It quotes Lenin's teaching that "[w]ithout a revolutionary theory there can be no revolutionary movement" and Engels' insistence that Communist teaching is no mere "dogma" but a "guide to action" (*ibid.*). It reviews the "history of hitherto existing society", which it equates, with Marx, to "the history of class struggles" (*id.*, p. 2), and assigns for reading (see *id.*, p. 3) the first chapter of the *Communist Manifesto*[21] (Ex. 39, pp. 9–21), where Marx and Engels traced this history in detail. Modern society, they held, is split "into two great hostile camps * * * directly facing each other—bourgeoisie and proletariat" (*id.*, p. 9). This "more or less veiled civil war, raging within existing society", finally "breaks out into open revolution" and results in "the violent overthrow of the bourgeoisie" by the proletariat (*id.*, pp. 20–21).[22]

Lesson IV (Ex. 93, pp. 12–17; Ex. 626, pp. 12–17; Ex. 613, pp. 12–17) deals with "The State" as it exists before (Ex. 626, pp. 12–13) and after (*id.*, pp. 13–15) "the Socialist Revolution." The state is defined as an "instrument for [the] oppression of one class by another" (*id.*, p. 12). The "bourgeois

[21] The *Communist Manifesto*, the joint product of Marx and Engels, was first published in 1848 (Ex. 39, p. 3). The copy in evidence was printed in this country in 1939 by International Publishers Co., Inc. (*id.*, pp. 1, 2), a Party publishing house.

[22] *Cf.* the closing words of the *Manifesto*, proclaiming that: "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. * * *" (*id.*, p. 44).

state" takes one of two forms—"fascism" or "bourgeois democracy" (*id.*, pp. 12–13). "[F]ascism" is "open and terroristic dictatorship of [the] bourgeosie" (*id.*, p. 13). "Bourgeois democracy", of which the United States is an example (*id.*, p. 12), is "dictatorship of [the] bourgeoisie" but in "veiled form"[23] (*ibid.*). "Following the Socialist Revolution" the state is in the form of the "dictatorship of the proletariat" (*id.*, p. 13), this being "a new type of democracy" (*id.*, p. 14)—not " 'complete' democracy", however, *i. e.*, "democracy for all," but rather a type of democracy which is "democratic *in a new way*—against the bourgeoisie" (*ibid.*, quoting Lenin). It is "*proletarian* democracy—the democracy of the exploited majority * * * directed against [the exploiting] minority" (*ibid.*, quoting Stalin). And when the proletariat takes power it does not "simply take possession of the ready-made state machine and use it for its own purposes" (*ibid.*, quoting Marx). "What is required is 'the shattering of the former state power * * *' " (*ibid.*, quoting Engels).

Included in the assigned reading for Lesson IV (see *id.*, p. 16) is chapter IV of Stalin's *Foundations of Leninism*[24] (Ex. 1, pp. 47–60), entitled "The Dictatorship of the Proletariat." "The dictatorship of the proletariat", says Stalin in the cited chapter, "is the instrument of the proletarian revolution" (*id.*, p. 47). It has the twofold purpose of "crushing the resistance of the overthrown exploiters" and "carrying the

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[23] *Cf.* petitioner Yates' testimony at the trial that the United States is a "bourgeois democracy" (Tr. 10554).

[24] *Foundations of Leninism* had its origin as a series of lectures delivered at Sverdlov University in Moscow in 1924 (Ex. 1, p. 5). The copy in evidence was published in this country in 1939 by International Publishers Co., Inc. (*id.*, p. 4), the Party publisher.

revolution to * * * complete victory" (*ibid.*). It is not sufficient for the proletariat merely "to seize [power]" (*id.*, p. 48). "The seizure of power is only the beginning. For many reasons the bourgeoisie that is overthrown * * * remains for a long time stronger than the proletariat which has overthrown it" (*ibid.*). "[T]o consolidate" the power which has been seized and "make it invincible" is the function of the dictatorship of the proletariat (*ibid.*). "Briefly", says Stalin (quoting Lenin), "*the dictatorship of the proletariat is the rule—unrestricted by law and based on force—of the proletariat over the bourgeoisie.* * *" (*id.*, p. 53; emphasis in the original). It (*id.*, p. 54)—

> * * * cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine, the bourgeois army, the bourgeois bureaucratic machine, the bourgeois police.

Stalin further points out in the cited chapter of his work that, while Marx did at one time concede the possibility of a "peaceful evolution of bourgeois democracy into a proletarian democracy" in "England and America", that concession no longer has validity (*id.*, p. 55). Now "the special conditions for peaceful development in England and the United States [have] disappeared" so that Marx's "qualification in regard to these countries * * * [can] no longer hold good" (*ibid.*). Hence, at present, in England and the United States no less than in other "imperialist countries of the world" (*id.*, p. 56)—

> * * * the law of violent proletarian revolution, the law of the smashing of the bourgeois state machine as a preliminary condition for such a revolution, is an inevitable law * * *.

Also included among the reading assignments for Lesson IV (see Ex. 626, p. 16) are chapters I, II, and III of Lenin's *State and Revolution* [25] (Ex. 11, pp. 7–48), a book which was written on the eve of the Bolshevik Revolution in Russia (see fn. 25, *infra*). "The replacement of the bourgeois by the proletarian state", wrote Lenin, "is impossible without a violent revolution" (*id.*, p. 20). The view that Marx contemplated a gradual development toward socialism as distinguished from a "seizure of power" was dismissed by Lenin as a "vulgar interpretation"; "as a matter of fact", he said, "*exactly the opposite is the case.* Marx's idea is that the working class must *break up, shatter* the 'ready-made state machinery', and not confine itself to merely taking possession of it" (*id.*, p. 33; emphasis in the original).[26]

Lesson V (Ex. 93, pp. 18–23; Ex. 626, pp. 18–20; Ex. 613, pp. 18–23), which treats of "Imperialism—Present Day Capitalism," teaches that the present stage of capitalist development is the stage of "imperialism" [27] (Ex. 626, pp. 18–20), or "dying capitalism" (*id.*, p. 19), when the capitalist systems are in a period of "general crisis" (*ibid.*). At this stage, "all material pre-requisites for [the] socialist re-organization of society" are fulfilled and the proletarian revolution becomes imminent (*id.*,

[25] *State and Revolution* was written in 1917 (see Ex. 315, p. 2). The copy in evidence was published in this country in 1932 by International Publishers Co., Inc. (Ex. 11, p. 2).

[26] Lenin, like Stalin (*supra*, p. 153), rejected Marx's theory that it might be possible for the "bourgeois" state in England and the United States to be destroyed without violence (Ex. 11, p. 34). "Today", said Lenin, "this exception made by Marx is no longer valid" (*ibid.*).

[27] "American imperialism", the lesson further says, "is the most powerful imperialist force in the world", "threatening [the] aspirations of [the] people of the world for peace, democracy and progress" (Ex. 613, p. 22).

p. 19). The lesson-outline adopts (see *id.*, p. 20) the discussion of this subject appearing in "pp. 167–172" of the *History of the Communist Party of the Soviet Union*[28] (Ex. 28), which treats of the means which Communists the world over should use to bring about the defeat of their "own" bourgeois governments in the course of their "imperialist wars" and to convert such wars into "civil wars" (*id.*, p. 167).

Lesson VII (Ex. 93, pp. 27–29; Ex. 626, pp. 24–27; Ex. 613, pp. 27–30) defines "Socialism" as the "[e]stablishment of the political power of the working class"—the "foundation of Soviet power"—"[a]chieved through Revolution" (Ex. 626, p. 24). A "prerequisite" of the "Socialist Revolution" (*id.*, p. 25) is said to be "[s]upport of the class conscious workers by the majority of the people" (*id.*, p. 26). "In order to obtain the power of [the] state", the outline states (*ibid.*, quoting Lenin),—

> * * * the class conscious workers must win the majority to their side. * * * We are not Blanquists, we are not in favor of the seizure of power by a minority. *

But that "the majority" referred to does not mean "[a]n absolute majority" of all the people (*ibid.*), and much less such a majority peacefully expressing their will at the polls, is quickly made clear: it means rather—and here the outline again quotes Lenin—that those who effect the "seizure of power" should have the "sympathy of the masses", meaning by "the term masses" the "majority of [the] workers" and of "the exploited" (*ibid.*).

The significance of the term "majority" in the foregoing is further clarified by "Chapter III, part

[28] This work, which was first published in 1939, was prepared under the supervision of the Central Committee of the Communist Party of the Soviet Union (see fn. 53, *supra*, p. 45).

3" of Stalin's *Foundations of Leninism* (Ex. 1, pp. 33–46), one of the passages which the outline assigns for reading on this point (see Ex. 626, p. 27). There, Stalin quotes a statement of Lenin's that (Ex. 1, p. 43):

> * * * It follows that for revolution it is essential, first, that a majority of the workers (or at least a majority of the class conscious, thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it * * *.

The matter is given even more pointed clarification by the fourth chapter of Stalin's *Problems of Leninism*[2] (Ex. 146, pp. 16–28), which the lesson-outline assigns as "Additional Reading" on this point (see Ex. 626, p. 27). Stalin, again quoting Lenin, refers with scorn to the view of the "petty-bourgeois democrats" that "the majority of the population" must "[f]irst * * * declare itself for the party of the proletariat" and that "[o]nly then can it, and should it, take power" (Ex. 146, p. 20). "That", says Stalin, still quoting Lenin (*id.*, pp. 20–21),—

> * * * is what is said by *petty-bourgeois democrats who call themselves 'socialists' but are really the henchmen of the bourgeoisie.* [My italics.—*J. S.*]
>
> "*But we say:* Let the revolutionary proletariat first overthrow the bourgeoisie, break the yoke of capital, break up the bourgeois state apparatus. Then the victorious proletariat will speedily gain the sympathy and support of the majority of the toiling non-proletarian masses

[2] *Problems of Leninism* was written in 1926 (Ex. 146, p. 92). The copy in evidence was copyrighted in this country in 1934 and printed in 1935 by International Publishers Co., Inc. (*id.*, p. 4).

> by satisfying their wants at the expense of the exploiters. [My italics.—*J. S.*] * * *"[30]

Nor does the cited work leave doubt as to the manner in which the proletariat should "break up" the "bourgeois state apparatus." Having "overthrow[n] the bourgeoisie and seize[d] state power", the same chapter continues, the proletariat (*id.*, p. 21)—

> * * * must introduce Soviet rule [and] smash to pieces the old state apparatus * * *.

That, finally, the methods of the elective process are quite alien to this whole process of power-seizure is made explicitly clear by Lenin's "reply" to "those who confuse the dictatorship of the proletariat" with "popular" or "elected" government (*id.*, p. 22)—which Stalin quotes with approval in this same fourth chapter. "The class which has seized political power", said Lenin (*ibid.*),—

> * * * does not deceive itself or others by talk about popular, elected government, sanctified by the whole people.

For, "[t]he scientific concept, dictatorship", he said (*id.*, p. 25),—

> * * * means nothing more nor less than * * * unlimited power, resting on violence and not on law. * * *"[31]

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[30] At a club "educational" held in 1949 (A. 197), a Party teacher quoted this passage (A. 199) to buttress his teaching that in the bringing about of socialism it is not necessary for the Party to have "a majority of the people" on its side before seizing power; that "once in power" the proletariat "had the obligation to shatter the state machinery"; and that "the actual taking over of the government would be violent, that there could be no chance of a peaceful overthrow" (A. 198).

[31] At a class held for new members in 1947 (A. 182-183), the Party instructor read to the students the following passage from the same (4th) chapter of *Problems of Leninism* to docu-

Lesson VIII [23] (Ex. 93, pp. 30–33; Ex. 626, pp. 28–31; Ex. 613, pp. 31–34) treats of "The Communist Party", "the vanguard of the working class", without which "it is impossible for the working class to achieve socialism" (Ex. 626, p. 28). The lesson assigns for reading (see Ex. 626, p. 31) "Chapter II (*The Method*)" of *Foundations of Leninism* (Ex. 1, pp. 20–27). In that chapter Stalin again heaps scorn on "[t]he opportunists" who "assert that the proletariat cannot and ought not to take power unless it constitutes a majority in the country" (*id.*, pp. 22–23). "No proofs are adduced", he says, "for there are no proofs, either theoretical or practical, that can justify this absurd thesis" (*id.*, p. 23).[24]

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ment her thesis that "both Stalin and Lenin agreed that [the advent of Communism] could not occur peaceably", that "there had to be a violent overthrow of the Government and a complete smashing of the capitalistic processes" (A. 183):

"Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat?

"Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adapted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution" (Ex. 146, pp. 19–20).

[23] Erroneously numbered "VII" in all three exhibits.

[24] In conformity with this principle, a Party school using the outline was taught that a necessary condition of the proletarian revolution is the existence of a Communist Party having the function of a "vanguard party" to "lead the revolution" not only "during [the] uprising" but also "after the armies, navies and the police force * * * had been crushed" (Tr. 1786).

[25] In a class discussion concerning whether "a majority of the people" would be needed to achieve a successful proletarian revolution, these words of Stalin were read to the class to prove that it is "possible to bring into effect the dictatorship of the proletariat without the necessity of having [a] majority of the working class in favor of it at that particular time" (A. 38–40).

Lesson IX [35] (Ex. 93, pp. 34–37; Ex. 626, pp. 32–35), the final lesson of the outlines, deals with "Strategy and Tactics", the "Science of Working Class Leadership" (Ex. 626, p. 32). The "essence" of this "science" is to "prepare [the masses] for [the] final struggle" (*ibid.*). The "[p]rincipal features of strategy" include "[d]irection of [the] main blow and distribution of forces" (*ibid.*). Tactics are "subordinate to strategy"; they change from time to time depending on the current situation (*id.*, p. 33). "What determines tactics?" the lesson-outline asks (*ibid.*). The reply, quoting from the *Program of the Communist International* [36] (Ex. 59, p. 80), states that "[i]n determining its line of *tactics*" (Ex. 626, p. 33)—

> * * * each Communist Party must take into account the concrete internal and external situation, the correlation of class forces, the degree of stability and strength of the bourgeoisie, the degree of preparedness of the proletariat, the position taken by the various intermediary strata in its country, etc. * * *

The lesson relates how the "Seventh World Congress [of the Communist International] develop[ed] new tactical orientation" (*id.*, p. 34). The "united front", "people's front", and "anti-fascist front" are listed as

[35] Lesson IX appears, for some reason to be missing from Exhibit 613 (see A. 620), the outline (or rather the copy in evidence of the outline) issued by the Party's Los Angeles County Educational Committee (see *supra*, p. 150). It is in both the other outlines.

[36] The *Program of the Communist International* was adopted in 1928 by the Sixth World Congress of the Communist International (Ex. 59, copyright page). It was copyrighted in this country in 1929 by the Party publishing house, Workers Library Publishers, Inc.; and at least three editions were published here (*ibid.*). The copy in evidence was published in 1936 as part of the third edition (*ibid.*).

examples of sound "tactics" for the times in which they were adopted, and it is suggested to the instructor that he "[g]ive historical examples of [their] application" (*ibid.*). The lesson lists for discussion the "difference between revolutionary and reformist tactics" (*id.*, p. 33) and the reading assignments include (see *id.*, p. 35) chapter VII of *Foundations of Leninism* (Ex. 1, pp. 88–106), entitled, like the lesson itself, "Strategy and Tactics." In that chapter Stalin explains the difference between a "reformist" and a "revolutionary"[37] and states the proper "use" to which the revolutionary should put "a reform" (*id.*, p. 104):

> The revolutionary will accept a reform in order to use it as an aid in combining legal work with illegal work, to intensify, under its cover, the illegal work for the revolutionary preparation of the masses for the overthrow of the bourgeoisie.

The lesson also assigns as "Additional Reading" (see Ex. 626, p. 35) a compilation of "Readings in Leninism" entitled *Strategy and Tactics*[38] (Ex. 147). Among the many passages on this subject to be found in this work is the following (*id.*, p. 66 [A. 527–528]),

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[37] "To a reformist", says Stalin, "reforms are everything, while revolutionary work is something incidental, something just to talk about, mere eyewash." For this reason, the "reforms" of the "reformist" are actually "instrument[s] for strengthening [the bourgeois] regime" and "for disintegrating the revolution." "To a revolutionary, on the contrary, the main thing is revolutionary work and not reforms; to him reforms are by-products of the revolution." (Ex. 1, p. 104.)

[38] *Strategy and Tactics*—the full title of which is *Strategy and Tactics of the Proletarian Revolution* (Ex. 147, p. 6)—is "one of a series of 'Readings in Leninism'" consisting of "articles and extracts * * * from the works of Marx, Engels, Lenin and Stalin", each "dealing with a basic question of Leninist theory" (*id.*, p. 3). The copy in evidence was copyrighted and published in this country in 1936 by International Publishers Co., Inc. (*ibid.*).

from the *Program of the Communist International* (see *id.*, p. 70):

> When *the revolutionary tide is rising*, when the ruling classes are disorganized, the masses are in a state of revolutionary ferment, * * * and * * * are ready for action and for sacrifice, the Party of the proletariat is confronted with the task of leading the masses to a direct attack upon the bourgeois state. This it does * * * by organizing *mass action*, upon which all branches of Party agitation and propaganda * * * must be concentrated. [Emphasis in the original]

This "mass action" is to include (*ibid.* [A. 528])—

> * * * strikes; * * * a combination of strikes and armed demonstrations and finally, the general strike conjointly with armed insurrection against the state power of the bourgeoisie.[29]

The second group of outlines.—The second group of outlines (see *supra*, p. 150)—those used in the Party's "Marxist Institutes" conducted during 1949 and 1950, *viz.*, Exhibits 163, 450, 201, 213, and 214—included among their assigned readings substantially the same Marxist-Leninist classics as had the earlier outlines. In many instances even the chapter- and page-references to these classics—the contents of which have been quoted or paraphrased in our discussion of the first group of outlines (*supra*, pp. 151–161)—are iden-

[29] *Cf.* the Party's discussion, in its theoretical organ *The Communist*, of the Party-instigated San Francisco general strike of 1934 as in effect a rehearsal for seizure of power (*supra*, pp. 141–142). For petitioner Schneiderman's and the Communist International's connection with this strike, see *supra*, pp. 60–63.

tical.[39] Several of the outlines in the second group include among their assigned readings "pp. 7–20" of Lenin's *State and Revolution* (Ex. 11)"—a passage in which Lenin cites Marx and Engels to prove that "replacement of the bourgeois by the proletarian state is impossible without a violent revolution" (*id.*, p. 20; Tr. 2781), that indeed "just this point of view about violent revolution lies at the root of the *whole* of Marx's and Engels' teaching" (*ibid.*). A number of the outlines in the second group list as "Required Reading" a 1947 article by William Z. Foster entitled *Marxism and American Exceptionalism* (Ex. 651),[42]

[39] For example, both groups of outlines list among their reading assignments the following passages from Stalin's *Foundation of Leninism* (Ex. 1):

Introduction (pp. 9–13) (quoted in part *supra*, p. 29): Assigned for reading in first group at Exhibit 626, pp. 2, 3; in second group at Exhibit 163, "Session One", p. 2 (see A. 620), Exhibit 450, "Session I", p. 3 (see A. 627), and Exhibit 201, "Session One", p. 2 (see A. 630).

Chapter II (pp. 20–27) (discussed *supra*, p. 158): Assigned for reading in first group at Exhibit 626, p. 31; in second group at Exhibit 450, "Session 6", p. 2 (see A. 628).

Chapter III, part 3 (pp. 33–46) (discussed *supra*, pp. 155–156): Assigned for reading in first group at Exhibit 626, p. 27; in second group at Exhibit 450, "Session 3", p. 3 (see A. 627) and "Session 6", p. 2 (see A. 628).

Most of chapter IV, *viz.*, pp. 47–53 (discussed *supra*, pp. 152–153): Assigned for reading in first group at Exhibit 626, p. 16; in second group at Exhibit 163, "Session Seven", p. 2 (see A. 622), and Exhibit 201, "Session Nine", p. 2 (see A. 633).

Chapter VII (pp. 88–106) (discussed *supra*, p. 160): Assigned for reading in first group at Exhibit 626, p. 35; in second group at Exhibit 450, "Session 9", p. 3 (see A. 629), and Exhibit 214, "Session 11", p. 4 (see A. 639).

[41] See Exhibit 163, "Session Six", p. 2, and Exhibit 201, "Session Eight", p. 3 (A. 633). See also Tr. 2748–2749, 2775.

[42] See Exhibit 163, "Session 4", p. 2 (A. 621); Exhibit 450, "Session 7", p. 3 (A. 629); Exhibit 201, "Session 5", p. 3 (A. 632).

the thesis of which is that, contrary to the teachings of the so-called "American Exceptionalists", the *Communist Manifesto* of Marx and Engels "IS", in the words of the article, "VALID FOR THE UNITED STATES" (*id.*, p. 11 [capitals in the original]; see Tr. 3547). The *Communist Manifesto*, as has previously been noted (*supra*, p. 151, fn. 22), boldly proclaims that (Ex. 39, p. 44)—

> The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. * * *

And in at least one of the "Marxist Institutes" the students were taught that, while the "pre-conditions" for the socialist revolution "would have to be developed over a period of time", as soon as the conditions were ripe for socialism "the change would be a violent thing" (A. 119–120).

The second group of outlines, however, also referred to sundry non-Marxist texts of an innocuous nature and contained statements purporting to repudiate the use of force and violence.[9] The evidence showed, however, that many of these non-Marxist texts were never used in the classes (A. 103–104). Set out in full at A. 622–626 is "Session 8" of Exhibit 163, the outline

[9] Witness Scarletto testified that when he first attended classes at the "Marxist Institute" in October of 1949 the Party's "county educational director" for Los Angeles gave him a copy of the *Communist Manifesto* in which the director had written the word "Read" in the margin opposite this passage (Tr. 2741, 2750–2753).

[10] "Session 8" of Exhibit 163, for example, refers to the "[e]fforts of [the] bourgeoisie today to identify Marxism-Leninism with advocacy of force and violence" (A. 623) and to the "[d]ifference between social change through revolution and advocacy of force and violence" (A. 624). "Historically", the lesson adds, "force and violence [is] always used by [the] domi-

prepared by petitioners Yates and Schneiderman (see A. 397), which purports to renounce the use of force and violence. It is to be noted that woven into the lesson, as examples of revolution, are references to various revolutions in which force and violence was used as a matter of historic record, including the "Russian Revolution [of] 1917" (A. 622).[45]

THE ORGANIZATIONAL STRUCTURE OF THE PARTY AND THE MAINTENANCE OF "IRON DISCIPLINE" THROUGH THE PRINCIPLE OF "DEMOCRATIC CENTRALISM"

The Communist Party is a tightly knit, rigidly disciplined, hierarchical organization. At each of its operational levels—national, state, county, "divisional", "sectional", and local—power is exercised through a governing group composed of officers and an executive committee, with each group strictly subject to the orders of and answerable to the one next above it.

The Party's Constitution declares that the highest authority of the Party is the National Convention (Ex. 153, p. 15). A national convention is held every two years and is composed of "delegates elected by the State and District Conventions"[46] (*ibid.*). Be-

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nant class to prevent expression of [the] democratic will of the people" (*ibid.*).

The Court may judicially note that the outlines in the second group were not used (see *supra*, p. 150)—presumably, indeed, they were not prepared—until well after the return of the indictment in the *Dennis* case, on July 20, 1948 (Record, No. 336, Oct. Term, 1950, p. 7).

[45] Also cited as examples of revolution are what are described as the "eastern democracies following World War II" (A. 622).

[46] "District organizations", according to the Party Constitution, "may be established by the National Committee. Where these cover two or more states, the State Committees shall be under the jurisdiction of the District Committee, elected by and

tween conventions, the Constitution further provides, the highest authority is the National Committee, the members of which are elected by the National Convention (*id.*, pp. 16, 17). The National Committee has "sole and complete authority to make all decisions and take all actions" for the Party (*id.*, p. 17). Within the National Committee there exists, or has existed in the recent past, a smaller group known as the National Board and within the National Board a still more select group known as the National Secretariat (Ex. 650, p. 1 [A. 598]; Ex. 55, p. 793). At the summit of the hierarchy are two officials known as the National Chairman and the General Secretary (Ex. 153, p. 18).

Next below the national organization come the State and District organizations, a District comprising (in some instances) two or more states (*id.*, pp. 12, 14). Subject to the ultimate authority of the National Committee, the State Convention is the highest authority within a state, and the State Committee the highest authority between conventions (*id.*, p. 13). In the case of a District which embraces two or more states, the highest authorities within the District are the District Convention and the District Committee, the Committees of the constituent states being under the jurisdiction of the District Committee (*id.*, p. 14).

Formerly, the California State organization of the Party was a constituent part of a District known as "District 13", which embraced three other western states and the Territory of Hawaii in addition to California (A. 16; Tr. 436; Ex. MM-1, p. 96). In the recent past, and apparently since about November 1942 (see Ex. 556 [A. 446]), the California State or-

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representing the Party membership of the States composing these districts" (Ex. 153, p. 14). As noted *infra*, p. 165, California was formerly part of "District 13."

ganization has not been part of any District group, being known simply as the "Communist Party of California."

The chief executive officer and Party leader at the state level is the "State Chairman", which official, it appears, is also at times referred to as the "District Organizer", even though no "district" in the strict sense of the term (see *supra*, p. 165) may be involved (A. 42). The position next in importance in the state is that of "Organizational Secretary" (A. 6), the duties of this official including the organizing of recruiting drives and mass campaigns in addition to the responsibility of seeing to it that all Party members in the state pay their dues (A. 393–394).

The California Party is further divided into County organizations (A. 16–17) and, in some instances, "regional" organizations, a "region" being comprised of two or more of the less populous counties (A. 16, 109). The highest authority in the county is the County Board or County Committee, the two terms being used interchangeably (A. 26–27). Each county is in turn divided into "sections" (A. 17), with units known as "divisions", each comprising several sections, sometimes intervening between these two levels (A. 292–293, 356). Each section is made up of "clubs", the lowest organizational unit (A. 388).

Each county, division, and section is governed by an executive committee, and the two principal officers at each of these levels (as at the state level) are called the Chairman, or "Organizer", and the Organizational Secretary (A. 2, 7, 9, 14, 17, 293, 318, 356), or "org. sec.", as that official is sometimes familiarly referred to (A. 290, 291, 293, 320).

The clubs, the basic units of the Party, are organized on a community, shop, or industrial basis (A. 388; Ex. 153, p. 12). Every Party member belongs to a club

(A. 388), and each club has its own executive committee (Ex. MF, p. 9). The club Chairman, who is required to be "one of the most politically developed comrades" (*id.*, p. 10), has the responsibility, among others, of "transmitting * * * the policies of higher bodies" to "the membership" (*id.*, p. 11). The club may also have an "Organizational Secretary" to assist the Chairman in his duties (*id.*, p. 10). Other club officials include "educational director" (*id.*, p. 11), "literature director" (*id.*, p. 14), "press director" (*id.*, p. 15), etc. Collectively, the officers constitute the "Club Executive", among whose responsibilities is the enforcement of "directives and policies of higher bodies" (*id.*, p. 9).

The evidence shows that petitioners Yates (A. 7), Stack (A. 45), Lima (A. 44), Healey (A. 44, 52), Schneiderman (A. 7, 44, 46, 52), and Richmond (A. 45) have all attended National Conventions of the Party. Petitioners Lima (A. 598) and Schneiderman (A. 7, 598) have served as members of the National Committee, and petitioner Yates has served as an alternate member of that body (A. 132). Schneiderman has in addition been a member of the even more select group (see *supra*, p. 165) known as the National Board (A. 131). Petitioners Stack (A. 72) and, apparently, Healey (see A. 44, 67–68) have attended National Committee "plenums", or formal meetings (A. 43). The evidence further shows that petitioner Schneiderman has been the California State Chairman for many years and that prior thereto, when the California organization was part of "District 13" (see *supra*, p. 165), he was, and had been since 1935, the "District Organizer" for that district (see *supra*, p. 60). Petitioner Yates has held the second-ranking State position (see *supra*, p. 166) of Organizational Secretary since 1950 (A. 114, 393) and petitioner Stack held that position before her (A. 238–239).

Yates testified at the trial that she, Schneiderman, and Stack were all members of the California State Committee in 1950 (A. 418), but refused to state which others of the petitioners were members of that body (A. 418–419). The evidence indicates, however, that, in addition to these three (A. 226–227, 229–231, 359–360, 376), petitioners Lima (A. 227, 230), Lambert (A. 226, 230, 359, 360, 376), Fox (A. 230–231, 366), Dobbs (A. 359, 368, 376), Healey (A. 231, 375), Carlson (A. 359), Richmond (A. 227, 230, 231, 367–368), and Connelly (A. 372–374) all used to attend meetings of the State Committee, at least from 1945 to 1949 (A. 225, 229, 374), including meetings held under conditions of strictest secrecy (A. 225, 232–234, 366, 369).[47]

Central control of all operations of the Party by its leaders is exercised by means of a Party principle known as "democratic centralism." This principle, in the words of petitioner Yates, is "the basic principle upon which the Communist Party organization is founded" (A. 388; see also Ex. 161). It is derived from the Communist Party of the Soviet Union, which insists upon the "strictest and truly iron discipline" (Ex. 1, p. 118). It requires that "all decisions of higher bodies shall be absolutely binding on lower bodies and on all Party members" (Ex. 28, p. 198). Thus, in California, all local units of the Party are controlled by the county leadership, which in turn is controlled by the State leadership, which in its turn is controlled by the national leadership (A. 9, 17, 26, 32–33, 36, 173, 196–197, 256–257, 320, 403; Ex. 161, p. 2; Ex. MF, pp. 9, 11; and see *supra*, pp. 164–167).

[47] For other evidence that the petitioners mentioned operated either partially or exclusively at the state level in California, see *supra*, pp. 11–69, where the evidence appertaining to each petitioner is separately collated.

One of the methods whereby the Party's leaders maintain this "iron discipline" and control over officials and rank-and-file members alike is the device of "purging" any member or official who fails rigidly to conform to the Party line as handed down from higher authority (A. 28–29, 53–55, 71, 147–151, 157–158, 201–202, 235–237, 310–313, 322, 328, 586–587; Ex. 153, pp. 19–20). Illustrative of this "purging" process, and of the inflexible obedience which the Party exacts of its members under penalty of expulsion, was the 1946 ouster from the Party of a group of San Francisco "left sectarian dissidents"[48] who had "challenged the leadership of the party" (A. 151) by failing to conform to the Party line and obey Party orders in a 1945–46 "machinist strike" in California (A. 150–153). At a Party meeting in May or June of 1946, "[t]he party leadership", represented at the meeting by petitioners Yates, Lima, Lambert, and Schneiderman, "accused the dissident group of not working with the party on the issues in the strike and of meeting separately in their own caucuses" (A. 151–152). "Charges were read against them" and each accused "got up and defended himself" (A. 152). One Verne Smith, a staff member of the Party newspaper *Daily People's World* (see *supra*, pp. 110–112), though "not on trial himself", also "defended these persons" as "good, sound party members and good trade unionists" (A. 152–153). Despite these pleas, however, not only were all the accused

[48] In the lexicon of the Party "left sectarians" are "forces within the Party who raise slogans which may sound very revolutionary, but are not in fact realizable at the given time" (Ex. 250, p. 3). As petitioner Schneiderman put it (see *supra*, pp. 64–65), "left sectarians" are "like the horse that was too far ahead of the cart"; since "revolution means tragedy, * * * violence and bloodshed", as he explained, it is not to be undertaken until the prospects of success are good.

themselves, one of whom was Lambert's own brother (A. 151, 153), expelled for their "anti-party activity" (A. 153); but Smith too was expelled, evidently for taking the others' part (A. 157–158). At a later meeting, moreover, held in September 1946 and attended by petitioner Yates (A. 147–148), charges were preferred against a Party member named Rosenbaum for "associating with [the] recently expelled members" (A. 148), and some weeks thereafter, at a meeting attended by petitioners Yates, Lambert, and Fox (A. 148–150), despite Rosenbaum's "fervent * * * defense of himself" as "a better Marxist than anyone present" and one who "had foreseen the Browder issue when the rest of the people present were still tied to Browder's coat tails" (A. 150), Rosenbaum too was expelled (A. 148, 159).[49] And still later, yet another Party member, witness Foard, was admonished by his club chairman for "associating with Rosenbaum," "an enemy of the party" (A. 158–159), and advised that the Party would "choose [his] friends and the persons with whom [he] was to associate" (A. 159).

THE CLANDESTINE NATURE OF THE PARTY

It has been pointed out that the Party had its actual origin, in 1919, as an "underground" organization (*supra*, p. 138)[50] and that later, in the 1930's,

[49] It was at this meeting that petitioner Fox (see *supra*, p. 41), in reply to Rosenbaum's taunting remarks that the Party "was still influenced by the Browder policies" and was "not a revolutionary party", angrily retorted that the Party "was a revolutionary party" and that "he wanted to see the overthrow of this lousy system just as much as anybody else present," but that the "time * * * for militant action * * * had not arrived yet" (A. 150).

[50] The so-called *Conditions of Affiliation to* [sic] *the Communist International*, as laid down by the Second World Con-

many of these very petitioners actively engaged in underground work, particularly in connection with activities of the Young Communist League (*supra*, pp. 27–28, 139–140). More recently, moreover, shortly after the close of World War II and the interlude of the Communist Political Association (see *supra*, pp. 144–145), the Party has taken major nationwide steps to expand and strengthen its underground operations and structure and to broaden the base of this phase of its activities, with the objective of insuring its survival as a vital revolutionary force even if it should lose some or all of its "top leadership" as a result of these leaders' being "arrest[ed]" by "the police" or "the Federal Bureau of Investigation" (A. 123).

The plan of operations, which National Chairman and alleged co-conspirator Foster brought back with him from Europe (A. 61–70, 76–77; Tr. 2254–2259, 2282–2289, 2324–2334), was described by witness Lautner, who participated in putting it into effect, as the "three-system" (A. 62). It was designed to provide a means of maintaining an effective "chain of command" within the Party with a maximum degree of secrecy (Tr. 2329). According to the plan, the Party members in a given state who were to be "integrated" (Tr. 2330–2331) into the underground

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gress of the Communist International (Ex. 514, p. 201), specifically required that all affiliated Parties have at least an underground component or "apparatus." They—*i. e.*, the *Conditions of Affiliation*—declared that because "the class struggle" in "nearly all countries in Europe and America" was "entering the state of civil war", "Communists can have no confidence in bourgeois legality. They must *everywhere* create a duplicate illegal apparatus", which "at the decisive moment" will be able to "help the party to perform its duty to the revolution" (as quoted in Lenin's *The Communist International* [Ex. 514], p. 202 [A. 566]; emphasis in the original).

structure were organized into seven "levels", starting at the top or "state level" and pyramiding downward (Tr. 2331). The highest level was to consist of three of the state's top-ranking Party officials. The next level was to consist of three groups of three lesser officials each, making nine in all, with each group under the command and supervision of one of the three top officials. The third level was to consist of nine groups of three still lower-ranking functionaries each, making 27 in all, with each of these groups similarly subject to the orders of one of the individuals on the next higher level. And so on down to the seventh level. (Tr. 2274, 2328–2332.) Each functionary at any given level, according to the plan, was to know one functionary on the next higher level, from whom he would receive his Party "instructions", and three functionaries on the next lower level, to whom he in turn would issue or relay instructions, but otherwise no individual was to have contact with or know the identities of any of the other members of the underground (Tr. 2330).

In addition to this "vertical structure", the Party leaders incorporated certain "horizontal aspects" into the underground organization (A. 64). These included such means of communication and related facilities as (A. 65; see also A. 66–70)—

> * * * the [preparation] of printing machines on all levels of the structure, the [preparation] of paper supply on the top levels * * *, * * * hiding places and contact places [for] party leaders * * *, drop places where party material can be dropped and picked up * * *,

[11] It was contemplated that only about ten percent of the Party's membership would compose its underground organization (A. 63).

> * * * documents and papers * * * to establish new identities for party leaders."[32]

The "underground system of communication" was also to include radio "relay stations", both "mobile" and "stationary", which were to be "powerful enough [to reach from] New York * * * to the West Coast" (A. 69–70).

In accordance with this national Party policy, the California Party in and after 1947 launched "a program of going underground" (A. 144, 159–161, 175–176, 331–332). California members were taught how the Party would operate on an underground basis (A. 122–123). In the event that "the Federal Bureau of Investigation" were to "arrest the top leadership", "the second leadership" was "to step in" so that there would be no "interruption of the party's program"; if "the second leadership" were arrested, "the third" was to take its place; and so on "down the line, they would still function as a revolutionary group to the fifth depth" (A. 123). Elaborate safeguards were taken to insure the secrecy of State Board meetings (A. 225–233). Even at the club level, elaborate "security" measures were adopted (A. 110, 159–160, 286–287, 318–319). Clubs were broken up into "squads," each consisting of "not more than five people and not less than three" (A. 318, 110, 286–287). Squad leaders would notify squad members of forthcom-

[32] That the program has had some success is indicated by the fact that alleged co-conspirator Robert Thompson, one of the four *Dennis* defendants who later became fugitives from justice, escaped apprehension for three years by making use of such underground paraphernalia as secret hiding places and false identification documents. It was Thompson, in fact, who was the national leader in charge of the underground planning (A. 61–65). It is noteworthy, moreover, that Thompson's hiding place was in California, petitioners' bailiwick. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841.

ing meetings only through personal contact if possible (A. 319). If it was necessary to make contact by telephone, veiled language was employed (A. 287). Roundabout routes were followed in going to meetings (A. 111). Members were admitted to meetings only after facing a panel and being identified (A. 92, 94, 144, 186–187, 192–194, 301–302, 303–304). All Party cards were destroyed in 1948 and thereafter no new ones were issued (A. 282–283, 301; Tr. 1537). Party activities were carried out through the use of codes (A. 232–233, 237, 287, 300). Following the demonstration of a dismountable type of mimeographing machine to petitioner Healey at the Party's national headquarters in New York, preparations were made to secure such machines in California (A. 67–68, 160–161).[53] At least one Party member, a witness in this case, was transferred from the open Party to the underground and trained to operate a printing press (A. 85–89) as part of a plan, he understood, "to move masses of people in time of crisis" (A. 88). And another Party member, likewise a witness, was excluded from "open" Party activity in 1950 and transferred to the underground because, as an employee of the North American Aviation Company, he was "associated with a key industry"[54] (A. 299–300).

THE PARTY POLICY OF CONCENTRATING ITS FORCES IN "KEY" OR "BASIC" INDUSTRIES

The Party believes and teaches (A. 57) that "to achieve the proletarian revolution and the dictatorship of the proletariat" (A. 60) it need "not necessarily [be] large * * * numerically" (A. 59); it is sufficient

[53] For the use to which such machines were intended to be put, see *supra*, pp. 172–173.

[54] For the Party's policy with respect to "key" or "basic" industries, its reasons therefor, and how such industries are defined, see *infra*, pp. 174–177.

that it be so situated as to be able "to influence the decisive sections of the American working class" (*ibid.*).[55] Because of this belief the Party has adopted what is known as its "concentration policy" (A. 601; Ex. 186, p. 3), *i. e.*, the policy of concentrating its recruitment and infiltration activities in the so-called "key" or "basic" industries. "Basic" industries are defined as—

> * * * those upon which the whole economic system depends. They include:
>
> 1. Those which produce material for production, like steel, mining, oil, chemicals.
>
> 2. Those which deliver material to the place of production or consumption, like railroad, trucking, marine, etc.
>
> 3. Those which produce power for running the wheels of industry, electric power plants, steam and hydro-electric plants, etc.[56]

The theory behind this "concentration policy" is the belief that the maintenance of "[s]trong Party organizations * * * in these basic industries" will at a critical juncture enable the Party, because of the

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[55] *Cf.* the *History of the Communist Party of the Soviet Union* (Ex. 28), p. 208 (A. 497), describing the first positions which the "Red Guards and revolutionary troops" occupied in the 1917 Bolshevik Revolution.

[56] J. Peters, *The Communist Party, A Manual on Organization* (Ex. 61), pp. 47–48 (A. 514–515). This work was published in this country in 1935 by the Party publishing house, Workers Library Publishers (*id.*, p. 2). Its author was identified at the *Hiss* trial as "the head of the whole underground of the American Communist Party" in the 1930's (Record, No. 320, Oct. Term, 1950, p. 233). In a preface to the work, for further details of which see *supra*, pp. 12–14, alleged co-conspirator Stachel wrote that it "fills a long-felt need" of the Party (Ex. 61, p. 3). Petitioner Yates, as noted *supra*, at p. 12, used to use it "as a textbook" in her lectures (A. 249).

"strategic importance [of these industries] in the economic system", to "deliver decisive blows" against the American capitalist system (*id.*, p. 48 [A. 515]).

In 1945, following the Communist Political Association period (see *supra*, pp. 144–145), the Party renewed and re-emphasized this concentration program (Ex. 55, pp. 805, 809, 812–815). "[A]ll strikes in basic industries must be Communist-led", said petitioner Healey at a Party meeting in 1946 (A. 133), and again, in 1947 (A. 305), she (A. 306)—

> * * * emphasized the importance of concentrating on the recruiting of * * * workers in the basic industries * * * such as the steel industry, the auto industry, the rubber industry, the oil industry, transportation, coal mining and so forth.

In 1948, a club chairman was told by the Party's Los Angeles County Committee that the National Committee "had chosen Steel, Auto, Mining, Electrical, Maritime and Railroad as the key industries for concentration" (A. 296). "[T]he county committee", she was further told, "had chosen * * * the local aircraft industries" for concentration by certain clubs, and "the oil industry" by others (*ibid.*). In San Francisco, the Party concentrated on the "transportation" industry among others (Tr. 5458–5459). Petitioner Stack told the Party's 1948 California State Convention that "[b]uilding the Party among industrial workers" was "basic" to the achievement of "our political objectives" (Ex. 186, p. 3). And in a 1948 report made to the Party's National Committee and published in its theoretical organ, *Political Affairs* (A. 599, 600), Henry Winston, an alleged co-conspirator and a *Dennis* defendant, said that the Party must be built in "key towns" and "key industries", such as "the packing, auto, railroad, and

maritime industries" (A. 651). "Our concentration policy", he said, "should run like a red thread through all phases of Party work" (*ibid.*).[5]

[5] Yates, the only petitioner to testify at the trial, admitted the existence of a Party policy whereby "certain industries in California have been selected * * * for purposes of concentration" (A. 389). For her statement of the "reasons * * * for the selection of these industries" "as [she] understand[s] it," see *ibid.* Contrast the reason for this policy as given in Peters' *Manual on Organization* (*supra*, pp. 175–176), a work which Yates used to use "as a textbook" (A. 249).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

Nos. ~~308, 309, 310~~ 4, 7, 8

OLETA O'CONNOR YATES, et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AMICUS CURIAE.

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Attorneys for International Longshoremen's and Warehousemen's Union, Amicus Curiae.

Table of Authorities Cited

Cases	Pages
Bridges v. United States, 346 U.S. 209	2
Bridges v. Wixon, 326 U.S. 135	2
International Longshoremen's, etc. v. Boyd, 347 U.S. 222	2
International Longshoremen's etc. v. Juneau Spruce Corp., 342 U.S. 247	2
Maneja v. Waialua Agricultural Co., Ltd., 349 U.S. 254	2
Peters v. Hobby, 349 U.S. 331	7
United States v. Bridges, ... F. Supp. ..... (July 29, 1955, N.D. Cal., No. 28,876)	8
United States v. Fujimoto, et al., 101 F.Supp. 293; 102 F.Supp. 890; 105 F.Supp. 727; 107 F.Supp. 865; 199 F.2d 27; 344 U.S. 852; and 14 F.R.D. 488	2
United States v. Holton, 222 F. 2d 840	7
Yates v. United States, ... F. 2d ..... (July 26, 1955, C.A. 9, Nos. 13,527 13,535, 13,541)	8

Miscellaneous	
Article by Frank Donner in The Nation, April 10, 1954, "The Informer"	7
Article by Richard H. Rovere, Harper's Magazine, May, 1955 "The Kept Witness"	7
Harvey Matusow's Book "False Witness"	6
Editorial in New York Times	7
Editorial in The Oregonian	7
Editorial in Washington Post, July 3, 1954	6
Editorial in Washington Post and Herald	7

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Earl Warren, Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now International Longshoremen's and Warehousemen's Union and moves for leave to file the attached brief as amicus curiae in support of the petition for certiorari herein.

International Longshoremen's and Warehousemen's Union, as the records of this Court show,[1] is a labor organization representing almost 100,000 persons employed in the longshore, warehouse, sugar refining and allied industries on the Pacific Coast of the United States and in Hawaii, all within the Ninth Judicial Circuit whose judgment the petitioners herein seek to review. As such a labor organization it is interested generally in any case wherein are involved questions arising under the Bill of Rights and especially the First Amendment, and specifically it is interested in these cases because (1) paid government informers, long reviled in the trade union movement, played a prominent role in the prosecution and (2) its own Regional Director, Jack Hall, is presently prosecuting an appeal from a conviction[2] under this very Smith Act, to the Ninth Circuit Court of Appeals.[3] This appeal is due to be heard in the court below within the next several months. Clearly a decision here—either granting or denying the writ—will have a real impact upon Hall's case and therefore amicus curiae's patent concern with the outcome of this case is obvious.

While First Amendment questions presented by the petitions here are of grave concern to amicus curiae,

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[1] *International Longshoremen's, etc. v. Juneau Spruce Corp.*, 342 U.S. 247; *International Longshoremen's, etc. v. Boyd*, 347 U.S. 222; cf. *Bridges v. Wixon*, 326 U.S. 135; *Bridges v. United States*, 346 U.S. 209; and *Maneja v. Waialua Agricultural Co., Ltd.*, 349 U.S. 254.

[2] Various aspects of that case are reported *sub nomine, United States v. Fujimoto, et al.*, at: 101 F.Supp. 293; 102 F.Supp. 890; 105 F.Supp. 727; 107 F.Supp. 865; 199 F.2d 27; 344 U.S. 852; and 14 F.R.D. 488.

[3] No. 13,915, in the files and records of that court.

because of its general concern as a trade union with the protection of rights basic to all Americans and its special concern with the rights of Jack Hall, it will not argue those points in this brief. Such matters it assumes are fully argued in the briefs of counsel for petitioners. Instead, and because of its special concern as a trade union, amicus curiae proposes to urge upon this Court the proposition that in a trial of opinion a conviction based largely if not exclusively upon the testimony of informers, cannot and should not be permitted to stand.

Amicus curiae has requested the consent of the parties hereto to the filing of the attached brief, and while the petitioners have given their consent, the government has withheld its. Therefore, amicus curiae is compelled to make this motion to this Court for leave to file the brief.

For the foregoing reasons, amicus curiae moves for leave to file the attached brief in support of the petitions for certiorari.

Dated, San Francisco, California,
October 3, 1955.

Respectfully submitted,
RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
Attorneys for International Longshoremen's and Warehousemen's Union, Amicus Curiae.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

Nos. 308, 309, 310

OLETA O'CONNOR YATES, et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AMICUS CURIAE.

In June of 1953 amicus curiae filed a brief as such in the case of *Yates v. United States*, ... F. 2d ..... (July 26, 1955, C.A. 9, Nos. 13,527, 13,535, 13,541 in the files and records of the court below). In that brief, amicus curiae urged a reversal of the sentences of conviction in those cases upon the ground that governmental use of informers in political cases was

an unhealthy, undemocratic, dangerous and anti-trade union phenomenon. A copy of that brief is annexed hereto as Appendix A.

The sentences of conviction in the *Yates* case were substantially reduced by a reversal of several of the judgments therein. While that was a contempt case and the cases now before this Court deal rather with an alleged conspiracy to violate the Smith Act, amicus curiae submits that reversals are equally in order here.

For since 1953, when the amicus brief in the *Yates* case was filed, the nation has witnessed an increased awareness by both the lay public and the judiciary of the damage done to the fabric of our society by the use of informers in political cases.

Thus, as early as July of 1954, and long before the publication of Harvey Matusow's "False Witness", *The Washington Post* observed editorially, in commenting upon the perjury committed by informers in the ***Ralph Bunche*** case:

> "It is in the area of political heterodoxy that the role of the professional informer in bound to be a malevolent one. Persons who give information to the police about conventional crimes, of course, render a service to society; and law enforcement authorities can usefully avail themselves of such information since it becomes subject to the exacting checks of due process in courts of law.
>
> "But the allegations of political informers are not usually subject to such checks." (*Washington Post,* July 3, 1954.)

Later, with the publication by Matusow of the book in which he revealed how for years he gave false testimony, other newspapers expressed grave concern over this problem. Excerpts from editorials in *The New York Times* and *The Washington Post & Herald* in the East, and later from *The Oregonian* on the West Coast, are attached hereto as Appendix B.[1]

These solemn warnings have come not only from nongovernmental sources. In recent months various branches of government, including the Department of Justice itself, have raised questions concerning the integrity and veracity of some of the informers heretofore used; indeed in one or two instances witnesses used in this very case were indicated as being suspect.

While recent judicial precedent on the subject is meager,[2] there are indications that some courts have begun to realize that the lives and liberties of Americans cannot be suffered to depend upon the testimony of political informers.

The Court of Appeals for the Seventh Circuit recently refused to direct deportation when the evidence upon which the order was based came from such a witness. Such testimony, the court said, had "no more probative value than the tattlings from a town meeting" (*United States v. Holton*, 222 F. 2d 840, 844 [C.A. 7]).

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[1]The article by Richard H. Rovere referred to in *The Oregonian* appears in *Harper's Magazine* for May 1955 under the apt title, "The Kept Witness". A very helpful study is Frank Donner's "The Informer", published in *The Nation* for April 10, 1954.

[2]While not directly in point, Mr. Justice Douglas' concurrence in *Peters v. Hobby*, 349 U.S. 331, 350, is not without relevance here.

And in his recent opinion dismissing the government's petition to denaturalize Harry Bridges, the International President of amicus curiae, District Judge Goodman cogently noted that "the testimony of the 'former' Communists was tinged and colored with discrepancies, animosities, vituperations, [and] hates * * *" (*United States v. Bridges,* ..... F. Supp. ..... [July 29, 1955, N.D. Cal., No. 28,876]).

Specifically with reference to one David Saunders, a political informer used in both the case at bar and the Bridges denaturalization case, Judge Goodman said: "Saunders' testimony is inherently flimsy; it has discrepancies. It is unacceptable." The judge also called this witness' testimony "peculiar" and "improbable".

Yet the testimony of such a man was submitted to the jury and formed (in part, at least) the basis upon which conviction of petitioners here was returned.

Common decency as well as a respect for our own institutions require that convictions so obtained be reversed.

For, as Sir Erskine May wrote many years ago:

> "Next in importance to personal freedom is immunity from suspicious and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say that they are free? Nothing is more revolting to

Englishmen than the espionage which forms part of the administrative system of Continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be ever sensible of their bondage."[3]

For the foregoing reasons, amicus curiae urges this Court to grant the writs petitioned for herein and to reverse the conviction of petitioners.

Dated, San Francisco, California,
October 3, 1955.

Respectfully submitted,

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
Attorneys for International Longshoremen's and Warehousemen's Union, Amicus Curiae.

(Appendices A and B Follow.)

[3]See Donner, *op. cit. supra*, p. 309.

Appendix A

Nos. 13,527, 13,541, 13,535

In the United States Court of Appeals
for the Ninth Circuit

OLETA O'CONNOR YATES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AMICUS CURIAE.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now International Longshoremen's and Warehousemen's Union as amicus curiae, and files this brief urging reversal of the judgments of contempt herein.

Amicus curiae has no doubt that appellant's brief adequately deals with the many specific legal issues raised by her appeal. There is, however, one matter of more universal concern affecting the labor move-

ment and trade unions generally which should be brought to the Court's attention. It is the purpose of this brief to advise the Court of the position of at least this trade union[1] with respect to this matter.

The question involved is whether the judiciary should punish—by an unconscionably severe sentence—a person who in good conscience and because of her own life experiences cannot bring herself to make public identifications of persons as members of the Communist Party.[2] There can be no question about the fact that the coercive power of the Court below was directed toward compelling Mrs. Yates, an official of the Communist Party, to reveal publicly the identity of persons claimed to be members of that party.

It is the submission of amicus curiae that sound public policy does not warrant the exercise of federal judicial power to force the disclosure of the identity of persons comprising a political party.

Amicus curiae is not concerned with such questions as the relevancy or materiality of the questions posed; their significance or lack of it for the prosecution's case; the absence of a wilful intent to be contumacious; or the like. These are dealt with by appellant

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[1] Amicus curiae is a labor organization representing approximately 75,000 persons employed in the longshore, warehouse and allied industries, functioning principally on the Pacific seaboard and in Hawaii, within this judicial circuit.

[2] Amicus curiae does not consider or pass upon, or feel called upon to consider or pass upon, the nature and character of the Communist Party. The position it here urges is based upon the principles to be discussed in this brief and is equally applicable to any party and particularly to any trade union.

in her brief. But all this aside, amicus curiae does assert that it is contrary to healthy trade unionism to compel a disclosure such as was here sought and that the utilization of judicial power to that end would set a dangerous precedent for the entire trade union movement.[3]

In a complex society such as ours, the preservation of the economic and political liberties of the American people can be achieved only by insuring to them the full freedom of association. In other words, an individual today can effectively exercise his rights—and his duties—as a citizen only by joining with other like-minded folk; an individual cannot realistically enjoy the rights guaranteed to him by our Constitution in "splendid isolation".

This is true not only with respect to political matters (*DeJonge v. Oregon,* 299 U.S. 353, 364; United *States v. Cruikshank,* 92 U.S. 542), but also especially economic ones. (*NLRB v. Jones & Laughlin Co.,* 501 U.S. 1, 33; *American Steel Foundries v. Tri-City Trades Council,* 257 U.S. 184, 209.) That the right to associate with other citizens on matters of public concern is protected not only by the federal Constitution, but also by those of most of the states (see 11 Am. Jur., Constitutional Law, §325) demonstrates that it is one of "those fundamental principles of liberty and

[3]Amicus curiae takes it that no argument is required to convince this Court that the maintenance of a vigorous and effective trade union movement is not only the accepted public policy of the United States, but is a prerequisite to a politically and economically sound and democratic society.

justice which lie at the base of all civil and political institutions * * *". (*DeJonge v. Oregon, supra.*)

That being so, it is obviously sound public policy to implement the right by making its exercise possible and conversely it is contrary to good government to enact rules—whether by legislation or by judicial fiat—which inhibit its exercise.

It is clear that a rule compelling the disclosure of the identity of the members of a political or economic association would go far toward destroying the freedom of association. Particularly is this true of associations organized to advocate unpopular or minority views.

American history is replete with evidence that the disclosure of membership lists in a young trade union movement, for example, was one of the chief methods used by its opponents to check and stifle it. Amicus curiae knows this from its own bitter experiences in seeking to organize unorganized workers.

In their *History of Labor in the United States*, John R. Commons and his associates report that the Knights of Labor (surely not a subversive organization!) retained to the end a provision in its constitution forbidding the revelation of the names of members lest harm be done to them.[4] Many American trade unions to this day continue this practice.

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[4]Commons, et al., *History of Labor in the United States*, Vol. II, p. 339 (Macmillan, N.Y. 1918). For other evidences of "secrecy" in the American labor movement and the economic need therefor see also Commons, *supra*, Vol. I, p. 403, Vol. II, pp. 195-97, 337, 415-16.

It is not surprising that even in this day of "enlightened" labor relations, the National Labor Relations Board will not, as a matter of policy, reveal, or require the revelation of, the names of union members (*Matter of Samson Tire and Rubber Corporation and United Rubber Workers of America,* 2 NLRB 148, 156; *Matters of R. H. Siskin & Sons and Steel Workers Organizing Committee (CIO),* 4 NLRB 187, 188, n. 3) and that in this view it has been sustained by the Courts (cf. *NLRB v. New Era Die Co.,* 118 F. 2d 500 [3 Cir.]; *Marlin-Rockwell Corp. v. NLRB,* 116 F. 2d 586 [2 Cir.], cert. den. 313 U.S. 594). It is realistically recognized that such revelation would result in a destruction of the trade union.

The role of the informer or spy in American trade union history is too well known to require extensive documentation. Amicus curiae need not point to its own experiences as a case in point. The monumental survey undertaken by the LaFollette Committee within recent memory highlights only too well the odious role played by such persons in our society. The literature of the American labor movement is rich—and with good reason—in the condemnation of the informer.[5]

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[5]See, for example, Huberman, the *Labor Spy Racket* (Modern Age Books, N.Y., 1937); Sutherland, *Treacherous Passage* (Educational Department, National Union of Marine Cooks & Stewards, San Francisco, circa 1949); Palmer, *Spies in Steel* (The Labor Press, Denver, Colo., 1920); and (no named author) *Labor Spies in the NMU* (National Maritime Union of America, N.Y., circa 1939).

Objective students have long recognized the anti-social role played by the informer and have reported upon the evils which flow from his employment.

> "In every social group there are always those who are willing to achieve a modicum of self-importance by carrying tales. If these are not present in sufficient numbers, financial rewards, or fear induced by petty blackmail or threat of discharge may be used. In some plants relatives of the employer often performed the tale bearing task. In (some companies) the setting up of a spy system inside the plants is a part of personnel management policy * * * The disgust of workers with this system of espionage is adequately summed up in the phrase 'stool-pigeon'." (Brooks, *When Labor Organizes,* p. 69, Yale University Press, New Haven, 1937.)[6]

There have been innumerable judicial expressions of abhorrence at the thought of one voluntarily assuming such a role—let alone being forced by the judiciary to assume it.

A courageous and far-seeing federal judge wrote in a period not unlike the present:

> "* * * spies are always necessarily drawn from the unwholesome and untrustworthy classes. A right-minded man refuses such a job. The evil wrought by the spy system in industry has, for decades, been incalculable. Until it is eliminated, decent human relations cannot exist between employers and employes, or even among em-

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[6]See also Mills and Montgomery, *Organized Labor,* pp. 606-07 (McGraw-Hill Book Co., N.Y., 1945).

ployes. It destroys trust and confidence; it kills human kindliness; it propagates hate.

"Compare Hunter's 'Violence in the Labor Movement,' c. 11, and the authorities therefor referred to in the appendix, pp. 368, 373; also 'Labor's Challenge to the Social Order', by John Graham Brooks, c. 5.

"Compare, also, May's Constitutional History (American Ed.) p. 39 et seq., for historical instances of the baneful results of the government spy system in England." (*Colyer v. Skeffington*, 265 F. 17, 69 [D.C., Mass.].)

An astute observer long ago gave another cogent reason why public policy requires the rejection of tale bearing as a social instrument when he said:

"A man who is capable of so infamous a calling as that of a spy * * * will be more industrious to carry that which is grateful than that which is true."[7]

These are not abstract or academic observations, and the members of amicus curiae have good reason to know the soundness of the views so expressed. Certainly a Court ought not, by threat of contempt, force a witness to be a spy or tale bearer.

The damage to the fabric of American society is too great, compared to the little, if any,[8] benefit to be

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[7]Joseph Addison, *The Spectator*, July 24, 1712.

[8]We understand it to be the fact that the questions appellant refused to answer, whether or not technically material, were of no real significance in the government's case against her or her co-defendants.

gained in the course of the trial to justify a holding that the witness should be required to reveal political confidences. Particularly, when as she asserted—and certainly not without reason—that great economic and possibly even physical harm, might befall those so revealed.

Amicus curiae are concerned, then, lest the decision of this Court give status, dignity, and honor to the informer. Amicus curiae believes that liberty-loving Americans of high principle would welcome a decision of this Court which would recognize the infamous role of an informer and an order which would courageously follow such an opinion.

For the reasons hereinabove set forth amicus curiae urge that the orders appealed from be reversed.

Dated, San Francisco, California,
June 12, 1953.

Respectfully submitted,
GLADSTEIN, ANDERSEN & LEONARD,
By NORMAN LEONARD,
Attorneys for ILWU, Amicus Curiae.

Appendix B

"THE PROFESSIONAL INFORMER

"The shabby business of the paid professional informer, which has reached new dimensions under governmental encouragement during the past few years, has been given a blow by one of the well-known practitioners of the art who now says he has been lying all along.

"Harvey Matusow, a former Communist and frequent witness in cases involving charges of communism, states that he deliberately gave false testimony on various occasions, including the 1952 trial of thirteen Communist leaders, the Senate hearings on Owen Lattimore, one of the McCarthy inquiries and the trial last year of a Texas labor leader accused of filing a false non-Communist affidavit. . . .

"Matusow's recantation, or whatever it is, . . . affords a new warning against the unquestioning acceptance by political and judicial authorities alike of the accusatory statements of the professional informer. . . ." (*New York Times*, Feb. 5, 1955.)

"OUT OF THE DEPTHS

"Harvey Matusow's self-exposure as a false witness should have surprised nobody—and least of all the Department of Justice. . . . The experience of many generations has taught a lesson which everyone concerned with the administration of justice should have learned—that political informers are often unsavory, unstable persons deserv-

ing credence only when what they say can be corroborated by other evidence. In its contemporary use of political informers, the Department of Justice has callously ignored this lesson. It has based a number of recent prosecutions on the testimony of extremely suspect witnesses. . . .

"Undoubtedly the use of informers sometimes is necessary. But in the area of political offenses the testimony of informers ought to be scrutinized with the utmost care. For this is the area in which they tend to flourish and become powerful in times of tension. 'Informers,' observed Professor Zechariah Chafee, Jr., of the Harvard Law School, 'have been the inseparable accompaniment of government action against the expression of opinion since the delators of Tiberius.'" (*Washington Post & Times Herald,* Feb. 2, 1953.)

"EXALTING THE STOOL PIGEONS.

"Despite the wave of revulsion that followed the grandstanding somersault of the paid government witness Harvey Matusow, most Americans are still unaware that federal agencies maintain a stable of 'expert' anti-Communist witnesses. Richard H. Rovere tells about this shock force of informers in the current Harper's magazine:

"There are, by official admission, more than 80 such persons retained on a more or less regular basis to take the stand in loyalty cases. All are former members of the Communist party, although some allegedly entered the party as undercover agents for the government. Each is paid $25 per day plus $9 for expenses while testifying.

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IN THE

Supreme Court of the United States

October Term, 1955

Nos. ~~308, 309, 310~~ 479

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EPHRAIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

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Many have earned several thousand dollars per year in this fashion, drawing all or a great part of their living expenses from their services on the stand. These shady characters are formally employed as 'consultants' under a law that frees them from need for security clearance. They are among a very few of the millions of federal employees so privileged.

"In such questionable hands rest the reputations of government workers and of thousands of others. Two members of the informers' squad recently admitted that they, like Matusow, had lied under oath. Their false accusations were against a citizen who had applied for a TV station license. Actually any American could find himself at the mercy of this powerful little cell. A few years ago a Seattle Times reporter won a Pulitzer prize for uncovering evidence to prove a paid ex-Red informer had lied when he accused a University of Washington professor of attending a Communist meeting in New York. . . .

"It is one thing to rout Communists out of government. It is quite another thing to give a little group of self-styled anti-Communists an intolerable degree of power over the loyalty status of all other Americans. The government's stool pigeons should be relegated to their proper role, and their words should be taken well seasoned." (*The Oregonian,* May 2, 1955.)

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IN THE

Supreme Court of the United States

October Term, 1955

Nos. 309, 310, 311

Oleta O'Connor Yates, Henry Steinberg, Doretta Starvus Stack, Frank Kenneth Spector, William Schneiderman, Al Richmond, Albert James Lima, Carl Ruth Lambert, Rose Chernin Kunitz, Ernest Otto Fox, Ben Dobbs, Dorothy Healey Connelly, Philip Marshall Connelly and Frank Carlson,

Petitioners,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion by American Civil Liberties Union, Southern California Branch, for Leave to File Brief Amicus Curiae.

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TABLE OF AUTHORITIES CITED

CASES — PAGE

Dennis v. United States, 341 U. S. 494 2

MISCELLANEOUS

American Civil Liberties Union pamphlet (N. Y., April, 1952), p. 4, The Smith Act and the Supreme Court 2

Congress of Industrial Organizations, Daily Proceedings, Nov. 18, 1953, p. 34 3

RULES

Rules of the United States Supreme Court, Rule 42(1) 1

Rules of the United States Supreme Court, Rule 42(3) 1

STATUTE

United States Constitution, First Amendment 2

IN THE

Supreme Court of the United States

October Term, 1955

Nos. 308, 309, 310.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion by American Civil Liberties Union, Southern California Branch, for Leave to File Brief Amicus Curiae.

Pursuant to Rule 42(1) and (3) of this court, the American Civil Liberties Union, Southern California Branch, respectfully requests leave to file a brief *amicus curiae* in support of petitioners.

The main thrust of *amicus* requested brief is that the Smith Act exceeds the power of Congress. This ques-

tion of law has not been presented by the parties. We believe it should be.

The government claims that the petitioners are members and officers of the Communist Party. We understand that there is no denial of such membership and the holding of such offices by most, if not all, of the petitioners. *Amicus* has no brief for the views of petitioners. On the contrary, it quite clearly opposes them. *Amicus* has stated its position against Communists and Communism so often in briefs *amicus* filed with this court before, that there is no need of repetition here.

It is the view of *amicus,* however, that the prosecutions here involved are beyond the power of Congress to permit and violate fundamental First Amendment freedoms. Accordingly it filed a brief *amicus* in both courts below. It was likewise the view of *amicus* that these constitutional principles were violated by the decision of the majority of this court in *Dennis v. United States,* 341 U. S. 494. The position of *amicus* on the Smith Act since *Dennis* is this:

> "The decision of the Supreme Court upholding the Smith Act of 1940 has not changed the position of the American Civil Liberties Union, and we find no barrier to further legal testing or to further criticism of its wisdom. We are convinced that this sedition law, and others like it, must be overruled by the force of later decisions or repealed by legislative action in order that we may live again under the full protection of the Bill of Rights." (*The Smith Act and the Supreme Court,* p. 4, pamphlet published by ACLU, New York, April, 1952.)

Amicus' criticism of the law is shared not only by a minority of this court, as set forth in the dissents in *Dennis,* but also by other responsible organizations.

Thus the Congress of Industrial Organizations, whose views on Communists and Communism are also well known to this court, at its 1953 Cleveland convention (p. 34, Daily Proceedings, Nov. 18, 1953) announced:

> "We again call upon Congress to review and revise the existing security laws, such as the Smith Act and the Subversive Activities Control Act, so that the security of the nation shall be safeguarded against acts of sabotage and espionage without subjecting individuals to persecution on the basis of speech, advocacy, or belief alone."

Amicus believes that its approach to the grave constitutional questions involved in this case, as set forth in its brief, is unique and from a different point of view; so that it will be of assistance to the court in arriving at its decision.

Respectfully submitted,

MORRIS E. COHN,

FRED OKRAND,

Attorneys for Amicus Curiae.

SUBJECT INDEX

	PAGE
Motion for Leave to File Brief Amici Curiae	1
Conclusion	6
Appendix "A." Names of Amici Curiae	App. p. 1

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Colyer v. Skeffington, 265 Fed. 1769	5
McNabb v. United States, 318 U. S. 332	6
Sopwith v. Sopwith, 4 Sw. & Tr. 243, 164 Eng. Rep. 1509	6
United States v. Flynn, et al., 130 Fed. Supp. 412	3

MISCELLANEOUS

Chaffee, Freedom of Speech (1920), p. 356	5
2 May, Constitutional History of England (1880), p. 275	4
Miller, Crisis in Freedom (1951)	5
New York Times, July 8, 1954 (editorial)	2
Sergeant, Liars and Fakers (Lond.), p. 130	4

IN THE

Supreme Court of the United States

October Term, 1955.
Nos. 308, 309, 310

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

The undersigned as counsel for the American citizens whose names are hereto attached (Appendix "A") are residents of the State of California, deeply concerned with the proper administration of criminal justice in the federal courts upon which the liberties of all persons depend. Since the sufficiency of the evidence to establish the charge made against these accused is one of the points pressed upon their petition for writ of certiorari, we deem it significant that much of the testimony adduced at the trial herein by the prosecution admittedly came from the lips of paid government agents. The use of paid informers

has become a matter of national concern, and grave doubt is being expressed by many responsible citizens as to the validity of convictions based on evidence which emanates from such biased sources. A recent editorial in the *New York Times* (July 8, 1954), states:

> "On the first page of this newspaper yesterday a dispatch from Washington began: 'The cult of the paid informer is growing in the Federal Government.' The process of informing is—as Justice Holmes once said of the not-unrelated art of wiretapping—a 'dirty business.' The tattletale of childhood becomes in adult life the gossip, the keyhole-peeper, the tipster, the informer, the agent. Paid or unpaid, it is a distasteful occupation, and one that does not become well a free society. It implies accusation without proof, defamation without responsibility. Yet there always have been and there always will be informers, and it is not too much to say that no police agency on earth has ever operated successfully without them.
>
> * * * * * * * *
>
> "The real problem of the informer arises not in this sphere but rather when questions of a man's personal life, of his thoughts, opinions or political activities are under scrutiny. Here is where employment of the informer may become dangerous to individual rights and liberties. The informer smacks of the police state; and we think that most Americans instinctively shrink from his use. It is reasonable to suppose that the professional, paid informers, such as those on the rolls of the Justice Department, who can be said to make their living at this game, feel the necessity of continuing to 'produce' if they are not to give up their lucrative occupation.

"Informers undoubtedly have their uses in uncovering elements of the Communist conspiracy; but it is essential that they be employed with the greatest judgment and discretion. Some informers have been caught in direct contradictions of testimony that smell strongly of perjury. If the Justice Department feels it essential to use informers in the conduct of its anti-Communist prosecutions under the law, it has the unmistakable duty to follow up relentlessly any indication that they may not be telling the truth. As the law-enforcement agency of our Government, the Justice Department has a primary obligation to maintain its own integrity and that of its agents."

In a case decided on April 2, 1955, the conviction of two persons in a Smith Act prosecution in New York was set aside because of the perjured testimony of one of the prosecution witnesses. District Judge Edward J. Dimock states in his opinion, *United States v. Flynn, et al.*, 130 Fed. Supp. 412, 416:

"The Matusow who first brought his tales to the Government and who was being prepared to act as a witness by the Government lawyers and who was on the witness stand in the trial was a man without regard for the truth, with a passion for the limelight and with the need for a few dollars."

Law and history attest to a universal aversion to the paid informer or professional witness. In every age they have been found unworthy of belief. We set forth here only a few of the many observations made by men of principle, learning and wisdom concerning the vice of accepting the testimony of such persons:

"Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their

steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, who shall say they are free? . . . The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in a spirit of absolutism; and suspected subjects will be very sensible of their bondage."

May, *Constitutional History of England* (1880), Vol. 2, p. 275.

In the 17th century, many persons went to their death because of the testimony of one person who swore that a "Popish" plot was afoot forcibly to overthrow the English government.

"The career of Titus Oates furnishes the severest indictment of England in the latter half of the seventeenth century. Of all the long line of liars in human history, he must surely be the one for whom the least shadow of excuse is possible That such a stupendous monster of mendacity should have been able to flourish for years at the public expense and high in the public esteem, trading upon the lowest instincts of bigotry, and dealing out death to innocent people without a grain of compunction, is a humiliating thought to those who would think well of their ancestors."

Sergeant, *Liars and Fakers* (Lond.), p. 130.

Commenting on the informer as a "recurrent feature of all prosecutions for opinion," Professor Zechariah Chaffee, of Harvard Uinversity, observes:

"In 1692 the chief accusers of the Salem witches were a club of young girls who sent more than one old woman to her death by telling how they had seen

her drink their blood or cause a yellow bird to sit on the minister's hat where it hung on a peg in the pulpit."

Chaffee, *Freedom of Speech* (1920), p. 356.

When the Sedition Act of 1798 was passed (only to be repudiated two years later by the people), Edward Livingston in Congress uttered a warning that has special force today:

"The country will swarm with informers, spies, delators, and all the odious reptile tribe that breed in the sunshine of despotic power. The hours of the most unsuspected confidence, the intimacies of friendship, or the recesses of domestic retirement afford no security."

See Miller, *Crisis in Freedom* (1951).

During the infamous Palmer raids of the 1920's a courageous judge stated:

"I cannot adopt the contentian that government spies are any more trustworthy, or less disposed to make trouble in order to profit therefrom, than are spies in private industry . . . A right-minded man refuses such a job. The evil wrought by the spy system in industry has, for decades, been incalculable . . . It destoys trust and confidence; it kills human kindness; it propagates hate."

Anderson, J., in *Colyer v. Skeffington*, 265 Fed. 1769 (D. C., Mass., 1920).

The danger of the informer derives from the very nature of his employment. The use of his testimony, particularly in the sensitive areas of opinion and expression, menaces with corrosion the very processes of justice:

". . . when the amount of his pay depends upon the extent of his employment, and the extent of his

employment depends upon the discoveries he is able to make, then that man becomes a dangerous instrument."

Sopwith v. Sopwith, 4 Sw. & Tr. 243, 247; 164 Eng. Repr. 1509.

Conclusion.

This court has stated:

"Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

McNabb v. United States, 318 U.S. 332, 340.

It is in that spirit that this motion is made. There is urgent need for this Court to halt the erosion of an essential liberty—a fair trial by due process of law and without the blight of the testimony of irresponsible paid informers.

Wherefore, your movants, *amici curiae*, respectfully request leave to file a brief *amici curiae* for the reasons and on the grounds hereinabove stated.

Respectfully submitted,

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Dr. D. R. Sharpe	Emeritus Executive Secretary Cleveland Baptist Association.
Dr. Edna Griffin	
Reverend A. A. Heist	
Bishop Walter Mitchell	Retired Bishop of Arizona.
Hugh Anderson	Member of Board of Southern California, A. C. L. U.
	Member of Board of L. A. County Conference on Community Relations.
Mrs. Helen A. Beardsley	
Eleanor Ashkenazy	Publicity; American Friends Service Committee, Pasadena.
Miss Theodora Ninesteel	Executive Director University YWCA, Westwood.
Dr. Stuart Innerst	Minister, First Friends Church, Pasadena.
Jack Y. Berman	Jewish Community leader.
George M. Day	Professor Emeritus of Sociology, Occidental College.
Gale Seaman	Advisory Board, Southern California A. C. L. U.
Merrill O. Brininstool	Vice President Walter Rauschenbusch Fellowship of Southern California.
	Pastor, Wilshire Baptist Church.
George P. Mangold	Professor, Sociology, U. S. C. (Retired).
Joseph Johnson	Architect, Pasadena California

Affiliations noted for identification.

Signers are acting only as individuals.

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IN THE

Supreme Court of the United States

October Term, 1956.

Nos. 6, 7 and 8.

OLETA O'CONNOR YATES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR JACK WAYNE HALL AND JOSEPH KUZMA, ET AL., AMICI CURIAE.

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INDEX.

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED HEREIN	4
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act	9
A. The Evidence of the Knowledge, Intent and Actions of the Individual Defendants Is Insufficient to Support Their Convictions Under the Smith Act, Constitutionally Interpreted	9
B. The Evidence Presented in These Cases Is Insufficient to Establish That Communist Party Teachings Fall Within the Prohibition of the Smith Act, Constitutionally Interpreted	18
II. Incompetent and Irrelevant But Inflammatory or Otherwise Prejudicial Evidence Admitted Against the Defendants in This and Other Recent Smith Act Trials Deprived Them of a Fair Trial and Violated Their Constitutional Rights Under the First, Fifth and Sixth Amendments	43
CONCLUSION	52

TABLE OF CASES CITED.

Page

Communist Party v. Subversive Activities Control Board, 351 U. S. 115 7

Cruikshank v. United States, 92 U. S. 588 46

Dennis v. United States, 341 U. S. 494 ...5, 6, 8, 10, 12, 14, 18, 19, 50

Dunne v. United States, 138 F. 2d 137 (C. C. A. 8, 1943) 15

Fiswick v. United States, 329 U. S. 211 51

Frankfeld v. United States, 198 F. 2d 697, cert. denied 344 U. S. 697 .....14, 16

Fujimoto v. United States, argued July 12, 1956, and presently pending (CA 9, No. 13915) 1, 3, 8, 12, 13; 14, 51

Gitlow v. People, 268 U. S. 652, 45 S. C. 625 16

Herndon v. Lowry, 301 U. S. 242 17

Krulewich v. United States, 336 U. S. 440 51

Lightfoot v. United States, No. 52, October Term 1956 ....2, 44, 45

Mayola v. United States, 71 F. 2d 65 46

Mulcahy v. Regina, L. R. 3 H. of L. 306 46

Scales v. United States, 227 F. 2d 581 .....2, 6, 10, 44, 45, 47, 51

Schneiderman v. United States, 320 U. S. 118 .....19, 41, 43

United States v. Brandt, (N. D. Ohio, unreported) 16

United States v. Dennis, 183 F. 2d 201 .....42, 45

United States v. Flynn, 216 F. 2d 354 (C. A. 2, 1954), certiorari denied 348 U. S. 909 .....14, 17

United States v. Flynn, 130 F. Supp. 413 (S. D. N. Y. 1955) ..14, 15

United States v. Kuzma, et al., pending (CA 3, Nos. 11655-63) 2, 3, 8, 12, 50, 51

United States v. Mesarosh, 223 F. 2d 449 ...2, 6, 16, 28, 40, 44, 48, 51

United States v. Scott, 74 F. 2d 213 46

United States v. Trachtenberg (S. D. N. Y. unreported) ... 16

Wellman v. United States, 227 F. 2d 757 (C. A. 6), petition for certiorari pending, No. 9 Misc. October Term 1956 .... 2, 16

Yates v. United States, 225 F. 2d 146 .....8, 11, 12, 44

TABLE OF STATUTES AND AUTHORITIES CITED.

Page

Foster, History of the Communist Party of the United States (1952) 20

Internal Security Act, Section 4(f) (50 U. S. C. 783) 5, 10, 12; 14, 18

Lenin, Collected Works, Volume VI, p. 29 35

Lenin's Selected Works, Volume VI, page 293, under title Can the Bolsheviks Retain State Power 34

Lenin's Selected Works, Vol. VI, p. 321 37

Lenin, War and the Second International, International Publishers edition, 1932, page 13 .....33, 35

Lenin, "War and the Workers" 35

Locke, Two Treatises of Civil Government 32

"Political Affairs":

August, 1940, "The Communists and the Fatherland Front" 25

September, 1947, Editorial, p. 779 23

September, 1948, "The Fascist Danger," p. 815 24

Smith Act, 18 U. S. C. 2385 ....1, 2, 4, 5, 8, 12, 18, 27, 32, 38, 42, 43, 44, 45, 47, 49, 50, 51, 52

Socialism, the Road to Peace, Prosperity and Freedom, published in March, 1951 by William Z. Foster 23

State and Revolution, Lenin Collected Works, Vol. XXI, bk. II, p. 180 34

Stalin's Foundations of Leninism, p. 44 36

The Theory and Practice of the Communist Party, June 1947, page 25 23

Twenty-three Questions About the Communist Party Answered by William Z. Foster 22, 42

The Twilight of World Capitalism, 1949, page 26, by William Z. Foster 21

U. S. Constitution:

Article IX, Section 2 31

First Amendment 4, 51

Fifth Amendment 4, 51

Sixth Amendment 4

18 U. S. C. 2384 48

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

Nos. 6, 7 and 8.

OLETA O'CONNOR YATES, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR JACK WAYNE HALL AND JOSEPH KUZMA, ET AL., AMICI CURIAE.

INTEREST OF AMICI CURIAE.

Jack Wayne Hall, appearing as *amicus curiae* herein with the consent of both petitioners and respondent, is one of the appellants in *Fujimoto v. United States,* argued July 12, 1956, and presently pending (No. 13915) in the United States Court of Appeals for the Ninth Circuit. With six others, Hall was convicted of conspiracy to violate the advocacy and organization provisions of the Smith Act (18 U. S. C. 2385), after a jury trial in the United States District Court for the District of Hawaii.

Joseph Kuzma, Joseph Roberts, Benjamin Weiss, David Davis, Thomas Nabried, Irvin Katz, Walter Lowenfels, Sherman Marion Labovitz, and Robert Klonsky, ap-

pearing as *amici curiae* herein with the consent of both petitioners and respondent, are the appellants in *United States v. Kuzma, et al.*, pending (Nos. 11655-63) and awaiting argument in the United States Court of Appeals for the Third Circuit. These nine appellants were convicted of conspiracy to violate the advocacy and organization provisions of the Smith Act, after a jury trial in the United States District Court for the Eastern District of Pennsylvania.

The *amici curiae* have been convicted under the same statutory provisions as, and indictments comparable to, those involved in the present case. Their appeals present several issues of law and fact which are identical with or closely related to those involved in the present case, as well as in the other cases under the Smith Act that are presently pending in this Court.[1] Accordingly, the *amici curiae* have a direct and substantial interest in this Court's disposition of these issues, and join in the prayer of the petitioners in these cases that the judgments of conviction be reversed.

STATEMENT OF THE CASE.

The charges, proceedings, statutes and issues involved in the *Yates* case are set forth in the briefs filed for the petitioners. The evidence relating to each of the petitioners individually is likewise set forth in their briefs,[2] as well as

1. See also *Mesarosh v. United States*, No. 20, *Scales v. United States*, No. 29, and *Lightfoot v. United States*, No. 32, October Term 1956, as well as *Wellman v. United States*, 227 F. 2d 757 (C. A. 6), petition for certiorari pending, No. 9 Misc. October Term 1956. The *Scales* and *Lightfoot* cases involve distinct questions arising under the so-called "membership clause" of the Smith Act, but the *Mesarosh* and *Wellman* cases are in most important respects similar to the present case, and the *amici curiae* respectfully request that this brief be considered in connection with those as well as the present case.

2. See, *e.g.*, the petition for certiorari in No. 6 (then No. 308 in the October, 1955 Term) at pp. 49-72, and the brief for petitioners Al Richmond and Philip Marshall Connelly in No. 8 (October Term, 1956).

in the Government's brief in opposition to the petition for certiorari (at pp. 5-21). The comparable circumstances with respect to the *amici curiae* are summarized below.

Jack Wayne Hall. All of the defendants in the *Fujimoto* case are residents of the Territory of Hawaii. Hall is, and was throughout the period covered by the indictment, the Regional Director for the Territory of Hawaii of the International Longshoremen's & Warehousemen's Union (ILWU). The record contains evidence that Hall became a member of the Communist Party in Hawaii in 1937, that he remained a member from then until 1941 and from 1945 to 1948, and that he attended Party meetings and conventions during those years. Evidence was offered but excluded that he was not a member of the Party in February, 1950. With the other six defendants he was indicted on August 29, 1951; the trial began in November, 1952, and resulted in judgments of conviction of all the defendants in July, 1953. Appeals from the judgments have been argued and are pending in the Court of Appeals for the Ninth Circuit.

Joseph Kuzma, et al. The nine defendants in the *Kuzma* case are members and functionaries of the Communist Party, in eastern Pennsylvania. Several of them have held positions on District boards and committees, or on the staff of the Daily Worker. They were indicted on August 17, 1953, convicted in August, 1954, and their appeals are pending and awaiting argument in the Court of Appeals for the Third Circuit.

Other details of the charges and evidence against the *amici curiae* are mentioned hereinafter, where pertinent to the argument.

QUESTIONS PRESENTED HEREIN.

1. Whether the evidence of the knowledge, intent, and actions of the petitioners is sufficient to support their convictions of conspiracy under the Smith Act, constitutionally interpreted.

2. Whether the evidence is sufficient to establish that Communist Party teachings fall within the prohibition of the Smith Act, constitutionally interpreted.

3. Whether evidence admitted against the petitioners deprived them of a fair trial and violated their constitutional rights under the First, Fifth and Sixth Amendments.

SUMMARY OF ARGUMENT.

I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act.

(A) The evidence of the knowledge, intent and actions of the individual petitioners is insufficient to support their convictions. In *Dennis v. United States*, 341 U. S. 494, this Court declined to review the evidence, but specified certain elements of proof—including personal knowledge, violent intent, and conspiratorial power—which are essential to the constitutional application of the Smith Act. In the present case, these elements have not been proved. The *Dennis* defendants were the principal leaders of the Communist Party at the national level. But in the present and numerous other Smith Act prosecutions the Government is seeking to sweep into the Act's ambit many Party members of minor or remote Party status and connection. With few exceptions, the lower federal courts (including the court below in the present case) have given only lip service to the constitutional requirements specified in the *Dennis* case. The convictions of the petitioners and others similarly situated are based on nothing more than evidence of Party membership and office-holding, and Party activities bearing no relation whatever to advocacy of violent overthrow of the Government. Such evidence is manifestly insufficient to support their convictions under the Smith Act as construed in the *Dennis* case, and as limited by Section 4(f) of the Internal Security Act (50 U. S. C. 783).

(B) The evidence of Communist Party teachings, as known to the petitioners, is insufficient to support their convictions. In the *Dennis* case, *supra*, the lower federal courts ruled, as a matter of law, that the defendants' conspiracy to use the Communist Party as an instrument of violent overthrow constituted a "clear and present danger" (see

183 F. 2d at 212 and 9 F. R. D. at 392), and this Court upheld the constitutionality of the Smith Act as applied to the facts found below. Although the defendants in the present and other pending Smith Act proceedings are charged with participation in the same conspiracy as was the subject of the *Dennis* trial, each case must stand upon its own record. In the present and other Smith Act cases the evidence fails to establish that the Communist Party is, or is known to the defendants as, an organization that advocates the violent overthrow of the Government "as speedily as circumstances permit." See, *e.g.*, the dissenting opinion in *United States v. Mesarosh*, 223 F. 2d 449, at 463-64. Accordingly, the convictions in the present and other such cases are unsupported by evidence of the defendants' guilty knowledge, or by proof sufficient to establish that the conspiracy as charged constitutes a "clear and present danger" to the security of the Government.

II. Incompetent and Irrelevant but Highly Prejudicial Evidence Was Admitted Against the Petitioners.

The prosecution was allowed, over objection, to present as evidence numerous third-party declarations not binding on but manifestly prejudicial to the petitioners.[3] The prosecution and the lower federal courts in recent Smith Act trials have proceeded on the theory that almost any declaration by an alleged member of the Communist Party, no matter how remote in time or place from the defendants, is admissible as evidence of its teachings. See, *e.g.*, *Scales v. United States*, 227 F. 2d 581, 589. But the Communist Party is not the conspiracy charged in these indictments, and it is only the Party's objectives *as known to the defendants* that are pertinent to the charges. To

3. See, *e.g.*, the petition for certiorari in No. 6 at p. 57, and petitioner's reply brief in support of the petition in No. 6 at pp. 22 and 30; the petition in No. 20 at pp. 31-47; the brief in No. 29 at pp. 41-43; and the brief in No. 32 at pp. 67-74.

require the petitioners to defend themselves against the out-of-court declarations of individuals unknown to them violates the guarantees of the First, Fifth and Sixth Amendments. The loose standards of admissibility that have prevailed in this and other Smith Act trials, resulting as they do in the admission of irrelevant and inflammatory testimony by "witnesses" such as the late Paul Crouch (*Cf. Communist Party v. Subversive Activities Control Board*, 351 U. S. 115), have denied petitioners and the other defendants the opportunity of a fair trial, and have worked great damage to the administration of justice in the federal courts.

ARGUMENT.

The *Yates* case and other Smith Act cases now pending in this Court present a wide variety of important constitutional and other legal issues. For example, the *Yates* case presents the question whether the trial judge's refusal to charge that the Smith Act punishes the advocacy of violent governmental overthrow only if it is by language reasonably calculated to incite such action (in accordance with Judge Medina's charge, approved by this Court in the *Dennis* case, *supra*) resulted in an erroneous and unconstitutional application of the Act. The *Yates* case likewise raises the question of the proper construction of the word "organize" in the Smith Act, in relation to the statute of limitations.[4]

In this brief *amicus*, however, we do not propose to argue all the issues, important as they may be, with which this Court is presently confronted. Rather it is our intention to deal with three basic problems, relating to the sufficiency and admissibility of evidence, which appear to be involved in all or nearly all the Smith Act proceedings that have been instituted since the *Dennis* case. For it is our belief that the Government's approach to these problems, and all too frequently the lower federal courts' disposition of them, have all but wiped out the constitutional limitations on the permissible scope of the Smith Act as stated in the *Dennis* case, and have resulted in a series of convictions that cannot be sustained or justified under the law of the land.

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4. These two questions are also involved in the *Fujimoto* case, *supra*, in which Hall is a defendant-appellant, and the second of the two is likewise involved in the *Kuzma* case.

I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act.

The first two matters for argument herein relate to the sufficiency of evidence to support convictions of Communist Party members for conspiracy to violate the Smith Act. Manifestly, there must be evidence concerning both the acts and state of mind of the individual defendants, and the teachings of the Party as known to them. For it is not the Communist Party itself that constitutes the conspiracy, nor would the activities of the handful of conspirators, standing alone, constitute a clear and present danger. In Smith Act conspiracy prosecutions there must be a *nexus* between the conspirators' violent intent, and their knowing use of the Communist Party as an instrumentality to bring about the overthrow of the Government as soon as possible.

A. The Evidence of the Knowledge, Intent and Actions of the Individual Defendants Is Insufficient to Support Their Convictions Under the Smith Act, Constitutionally Interpreted.

The general nature of the evidence presented and relied upon by the Government to establish the guilt of individual defendants in Smith Act conspiracy trials may be illustrated by a syllogism:

(1) Every defendant who is shown to be a Communist Party member is a member of a conspiracy with every other Party member named as a defendant or co-conspirator in the indictment.

(2) Some documents and declarations by Communist Party members contain passages preaching the inevitable necessity of overthrowing existing "capitalist" governments by force.

(3) *Ergo*, every Communist Party member is also a member of a conspiracy to advocate the overthrow of the Government by force and violence as soon as circumstances permit.

The foregoing is hardly an understatement of the specific gravity of the evidence against some of the defendants, and it is certainly not an overstatement of its egregious inadequacy to support the convictions. Of course, the prosecution generally seeks to fatten its proof with evidence of the Party offices held and Party activities engaged in by the defendants. But Party membership and office-holding are expressly ruled out as a basis of criminal liability by Section 4(f) of the Internal Security Act (50 U.S.C. 783). And the Party "activities" established by the evidence have generally amounted to nothing more than attendance at Party meetings and conventions, recruiting of new members, distribution of Party literature, attendance and instruction at Party schools, and other such undertakings which, misguided or not, fail to prove the essentials of criminal liability under the Smith Act. Such activities are simply the normal attributes of membership, and establish nothing more than that fact.

In the *Dennis* case, the defendants were the principal leaders of the Party at the national level, and the leading participants in the 1945 Party convention at which the conspiracy was alleged to have been hatched. The lower courts found the evidence of their individual guilt sufficient to sustain the convictions. This Court did not review the sufficiency of the evidence, but stated several elements of proof which are requisite to the constitutional application of the Smith Act. These requirements are discussed in the briefs filed in the several Smith Act cases pending in this Court,[5] and there is no need here to recapitulate them.

Since the *Dennis* case, however, these constitutional and statutory limitations on the scope of the Smith Act have been honored chiefly in the breach. The Government has cast its prosecutory net ever more widely. There have been two more trials of Party officials in New York City, and other conspiracy trials of local Party functionaries in

5. See, *e.g.*, the brief in No. 29, *Scales v. United States*, at pp. 20-22.

Baltimore, Los Angeles, Seattle, Pittsburgh, Denver, Cleveland, St. Louis, Detroit, Philadelphia, New Haven, Boston, Porto Rico, and the Hawaiian Islands. In addition, a few other Party officials have been separately indicted under the so-called "membership" clause of the Smith Act.

By this great proliferation of Smith Act prosecutions, and extension of the process into lower and local reaches of the Party, inevitably the evidentiary strands of conspiratorial connection between those newly indicted, and the *Dennis* defendants at the hub of the alleged conspiracy, have been stretched to the snapping point. The prosecution has found it difficult or impossible to produce any evidence of personal participation in or knowledge of any plans for or discussion of violent overthrow, and has relied ever more heavily on evidence of Party "activity" of no probative value in terms of guilty knowledge or intent.

The *Yates* case is a good example of this trend. Most of the petitioners have occupied only minor positions in the Party organization on the West Coast, as the petition and briefs on certiorari show.[6] A large part of the Government's evidence[7] consists of nothing more than a listing of the various Party positions held by the petitioners—the very type of evidence which Section 4(f) of the Internal Security Act specifically rules out as a basis of criminal liability. Beyond this the Government relies chiefly on evidence concerning the internal structure and disciplinary policies of the Party, and a few extracts from "classical" Communist books that were used in Party schools on the West Coast.

The lower court in the *Yates* case made no effort to apply the constitutional requirements, laid down in the

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6. See for example, the prosecution and defense summaries of evidence relating to petitioners Dorothy Healy Connelly and Rose Kuznitz (Petition, pp. 49-50 and Brief in Opposition, pp. 11 and 13-14), and the separate brief in No. 8 for petitioners Al Richmond and Philip Marshall Connelly.

7. See the Brief in Opposition, pp. 5-14.

Dennis case, to the evidence before it. Conspiracy among the petitioners was inferred from the mere fact of Party membership. At no point did the court consider the evidence against the individual defendants; as Communists they were assumed to be fungibles. Their guilty knowledge and intent were inferred and the convictions affirmed on the grounds that "many" of the fourteen defendants "sought and obtained office as 'organizers' in the Party", and that "most" of them were in "association" both "among themselves and with other co-conspirators and with other persons whose advocacy of destruction is known". See *Yates v. United States*, 225 F. 2d 146, 163-64. Such a loose and foggy scrutiny of the record is an abdication of the appellate function, and makes a mockery of the constitutional and statutory provisions that limit the Smith Act.

The *Kuzma* case, now pending before the Court of Appeals for the Third Circuit, marks an extension of the same trend. The defendants are Party workers in eastern Pennsylvania. There is no evidence that any of them advocated or heard advocacy of the violent overthrow of the Government. The sum total of the evidence against them is that they attended meetings of the Communist Party, and that they studied its literature and encouraged others to do the same. This is the very evidence that was offered to prove their membership in the Party, and it adds nothing to the fact of membership. Under the principles stated in the *Dennis* case, and the provisions of Section 4(f) of the Internal Security Act, their convictions are insupportable.

The prosecution of the defendants in the *Fujimoto* case, and in particular the charge against Hall, mark an even further extension of the notion of "inferential guilt" under the Smith Act, which the Government is so zealously seeking to propagate. The defendants were all thousands of miles away from New York City at the time of the alleged conspiratorial Party convention of 1945. The *Dennis* defendants are named as co-conspirators in the *Fujimoto*

indictment, but there was no evidence that any of the *Fujimoto* defendants were even known to the Party leaders in New York City at that time, much less privy to their decisions and plans.

Hall himself, according to the prosecution's witnesses, was recruited into the Party in 1937, at which time he was engaged in union organizational activity in the Territory of Hawaii. He distributed Party literature and attended meetings, and became a member of the "informal executive board" in Hawaii. He briefly attended a Party school in San Francisco in 1939. When the Party was reconstituted in 1945, Hall participated in recruiting, attended territorial conventions in 1946, 1947, and 1948, and participated in the discussion of several Party policy problems. That is the sum total of the evidence on the basis of which Hall has been convicted of conspiracy to overthrow the government of the United States by force and violence as soon as circumstances permit.

The prosecution offered no evidence that Hall ever advocated or heard advocated the violent overthrow of the Government, or that he regarded the Party as an instrument for that purpose. It offered no evidence that Hall intended any such thing, and the prosecution witnesses (former Party members in Hawaii) testified that Hall and they themselves joined the Party because they thought it would be helpful in unionizing the longshoremen and plantation workers. Hall's contacts with Communists on the mainland were almost nil, and he was wholly unknown to the "leading" ex-Communist witnesses such as Crouch and Lautner. Hall was not a Party staff worker, and was actively and fully occupied throughout the period of his Party membership in union activities, especially in organizing the Hawaiian branch of the ILWU, of which he became Regional Director in 1945. With no evidence of guilty knowledge, and with the prosecution's own evidence on the issue of intent strongly tending to negate the very element on

which guilt would depend, the case should never have been allowed to go to the jury.[8]

Indeed, it is clear that the charges against many if not all of the defendants in the cases now pending before this Court and in which the *amici curiae* were convicted, would have been dismissed for lack of sufficient evidence under the principles applied by Judge Edward J. Dimock at the trial in *United States v. Flynn*, 216 F. 2d 354 (C. A. 2, 1954), certiorari denied 348 U. S. 909. Motions to dismiss the Smith Act conspiracy indictments in that case were argued before Judge Dimock in 1952, after enactment of the Internal Security Act[9] and after this Court's decision in the *Dennis* case. Moved especially by his reading of Section 4(f) of the Internal Security Act, Judge Dimock considered the evidence against each defendant with great care, and granted judgment of acquittal to two of the defendants. From his colloquy with prosecution counsel[10] it is clear enough that he was looking for evidence that would bring the defendants "in contact with the particular tenets of the Party that are treated as illegal"—to wit, violent overthrow of the Government.

In most of the instances where Judge Dimock declined to direct acquittals; it is impossible to determine what evidence appeared to him sufficient to take the case to the jury. But in the two instances—Begun and Gerson—where the cases were dismissed, there is no difficulty in ascertaining what he thought to be insufficient.

The defendant, Isidore Begun, had been both Legislative Secretary and Educational Director of District 2 (New York) of the Communist Party. He had been County Or-

8. Motions for judgment of acquittal as to all the defendants in the *Fujimoto* case were made and argued at the close of the prosecution's case, and were denied by the trial judge, apparently on the authority of *Frankfeld v. United States*, 198 F. 2d 697, *cert. denied* 344 U. S. 697.

9. The indictment in the *Flynn* case was filed in June, 1951.

10. See the transcript in *United States v. Flynn*, No. C136-7 (S. D. N. Y.) pp. 9939-86.

ganizer and Chairman in the Bronx, and was a member of the New York State Committee and Board. As a Communist, he was personally known to and by Louis Budenz and John Lautner when they were Communists. He attended the Party's National Training School in 1947, and the 1945 and 1948 New York State conventions. In 1949 he participated in a meeting in New York which considered the "underground" structure of the Party.

Simon Gerson had been a member of the Communist Party since 1935, and was on the staff of the *Daily Worker*. He was also known to and by Budenz, was Legislative Secretary of the New York Party organization, a member of the State Committee, and attended State Board and Committee meetings and the 1948 National Convention.

It is too plain for argument that the evidence against Begun and Gerson, both of whom were responsible Party functionaries working in close proximity to the Party leadership, is far stronger than the case against the petitioners or the *amici curiae*. Yet Judge Dimock granted acquittals to both Begun and Gerson, for lack of evidence sufficient to warrant a jury in finding that either of them had the knowledge and intent required for a conviction. For the same reason, Judge Dimock subsequently set aside the convictions of two more defendants—Trachtenberg and Charney—when it developed that the essential evidence with respect to their knowledge and intent was perjured testimony.[11]

In thus holding the prosecution firmly to the requisite elements of proof, Judge Dimock was following the precedent established in the very first Smith Act case,[12] in which the trial judge directed the acquittal of five of the defendant members of the Socialist Workers' Party on the ground that ". . . there is not sufficient evidence to go to the jury, and not sufficient evidence of knowledge of the

11. *United States v. Flynn*, 130 F. Supp. 413 (S. D. N. Y. 1955).

12. *Dunne v. United States*, 138 F. 2d 137 (C. C. A. 8, 1943).

Party by such defendants or that they participated in the activities to overthrow the Government by force and violence. . . ."[13] And recently, in *United States v. Brandt*, (N. D. Ohio, unreported) Judge Charles J. McNamee, on the same basis, granted judgment of acquittal to the defendant David Katz, and in *United States v. Trachtenberg* (S. D. N. Y. unreported) Judge Bicks similarly acquitted Marian Bachrach.

In these few instances, trial judges have made conscientious efforts to apply the principles of the *Dennis* case, and have endeavored to give some practical effect to Section 4(f) of the Internal Security Act. Unfortunately, such care and sense of discrimination have been the exception rather than the rule. As already noted,[14] they were lacking in the decision below in the present case, which lumped the defendants indiscriminately and upheld their convictions on the basis of nothing more than Party officership and association. The same was true in the *Mesarosh* case (No. 20), where the court flatly declared[15] that the defendants' "numerous roles as active Party leaders without more would have been sufficient to attribute to each defendant a full knowledge of the Party's purpose to bring about the forceful and violent overthrow of the government."[16]

However, as Judge Dimock pointed out, the mere showing of Party activity is not enough. The activity need not

13. The trial judge's ruling is quoted from the record in the Circuit Court of Appeals, at p. 856. The record contained evidence that the defendants as to whom judgment of acquittal was granted had attended Party meetings (see, *e.g.*, pp. 195, 209-10, 256-57, 257-59, 494, 523, 532, 542, 567, 604, 630, 642, 681-82, 687, 697, 699, 700-01, 738, and 754-57) and engaged in various Party activities. The jury acquitted five more defendants. The convictions were affirmed by the Court of Appeals under the doctrine of the *Gitlow v. People*, 268 U. S. 652, 45 S. C. 625, and therefore on the theory that the "clear and present danger" rule had no application to the case.

14. *Supra*, p. 12.

15. *United States v. Mesarosh*, 223 F. 2d 449, 451-52.

16. To the same general effect see *Wellman v. United States*, 227 F. 2d 757, 763; *Frankfeld v. United States*, 198 F. 2d 679, 686.

be intrinsically unlawful, but it must be the *sort* of activity that reasonably supports an inference of guilty knowledge and intent. As Judge Dimock put it:[17]

> "I think there must be some showing that the activities were such as to bring them [the defendants] in contact with the particular tenets of the Party that are treated as illegal in this case."

In other words, the fact that an individual attended a number of Communist meetings and conventions is very poor evidence of knowledge of the Party leaders' aims, and is no evidence at all that the individual personally intended to bring about the violent overthrow of our Government as soon as circumstances permit. To support such inferences, the "activities" must be somehow "in contact with" the Party's unlawful aims.

But one may search in vain the Government's brief in opposition to the petition for certiorari in the present case for any evidence of acts or declarations by the petitioners that bring them "in contact with" any unlawful aims. Lacking such evidence, the Government is obliged to discourse at length (at pp. 14-26) on such diverse topics as "democratic centralism", the role of Party newspapers, "concentration" in key industries, and the Party "underground". However enlightening all this information may be, it is not evidence on the crucial issues of the petitioners' personal knowledge and intent. The Government appears to lay great stress on the fact that petitioners were exposed to Party literature, including the "Marxist-Leninist classics", with their passages on the necessity of a violent revolution. Whatever the "proper" interpretation of these extracts, however, there was no evidence that the petitioners read, understood, or agreed with any of these portions. *Cf. Herndon v. Lowry*, 301 U. S. 242.

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17. See the transcript in the *Flynn* case, *supra* note 10, at p. 9961.

The essential vice in this and other recent Smith Act prosecutions is that the Government persists, despite what Congress provided in Section 4(f) of the Internal Security Act and despite what this Court said in the *Dennis* case, in treating "active membership" in the Communist Party as tantamount to guilt under the Smith Act. The prosecution, and all too often the lower courts, have quite failed to meet the basic questions. Has the individual Smith Act conspiracy defendant, however misguided, joined the Communist Party as a vehicle for the peaceful achievement of political and economic goals, or for some other lawful purpose? Or are he and others conspiring to use the Party to overthrow the Government by force as soon as circumstances permit? Unless the latter circumstances can be proved, there may be a "clear and present danger" lurking somewhere, but it will not be criminally attributable to the defendant.

And so, if these convictions stand, the inevitable result will be greatly to expand the scope of the Smith Act; to sweep within its ambit and subject to criminal liability many other men and women who have been members of the Party, as a result of motives and conceptions which may indeed have been foolish, but which were wholly lacking in any violent or unlawful intent. Such an outcome is insupportable under the law of the land as declared by the Constitution, the Congress, and this Court, and these convictions must be set aside.

B. The Evidence Presented in These Cases Is Insufficient to Establish That Communist Party Teachings Fall Within the Prohibition of the Smith Act, Constitutionally Interpreted.

In the present argument we do not deal with any case in which there is specific evidence of teaching or advocacy of violent overthrow by individual defendants during 1949-1952. Instead, the present argument is addressed to the pending cases where the government relies upon the teach-

ing of the Communist Party of the United States during the statutory period, coupled with additional proof, whatever it may be, to bind the individual defendants to such teaching. In the cases now before the Court, and those pending in which amici curiae are interested, there is much direct documentary evidence to show precisely the position of the Communist Party of the United States during this period. That evidence shows that neither the Communist Party of the United States in its own teachings or as based upon Marxism-Leninism advocated between 1949 and 1952 the duty or necessity of overthrow of the present Government of the United States by force or violence while parliamentary and constitutional methods of change remained open.

The nature of Communist Party doctrine, as related to the issue of violent overthrow under the Smith Act, has been determined in various decisions of the lower federal courts, but not by this Court.[18] In the *Dennis* case, this Court declined to pass upon the factual issues, but took the conclusions of the Court of Appeals as assumed. Needless to say, the question whether the Party does or does not advocate violent overthrow and under what circumstances imminent or remote, must be determined on the basis of the record in each case. Whatever one's preconception about the Communist Party may be, if the Government chooses to indict the Party's members for criminal advocacy, the criminal nature of the advocacy must be proved in each case.

We do not understand that the Government makes any contention that the 1945 constitution of the Communist Party or any of its official resolutions, or other pronouncements since that date, contain any advocacy of force and violence; indeed, these means are explicitly disclaimed and

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18. This Court did, however, analyze Communist doctrine in the *Schneiderman* case. See *infra*, pp. 41, 42.

condemned.[19] Primarily, the prosecution has relied on statements in the "classical" Communist writings of Lenin, Stalin and others, and on "expert opinion" evidence of its stable of professional witnesses such as Budenz, Crouch and Lautner. We do not believe that such "evidence" is admissible against these defendants under any known principles of evidentiary law.[20] But assuming that they may be looked to as evidence of Communist advocacy during the statutory period, they lend no support to the Government's charges.

William Z. Foster, who, in each of these cases, is named as a co-conspirator, in 1952 published his *History of the Communist Party of the United States.* Since he was the principal leader of the Communist Party, and indeed led the fight against Browder which resulted in the re-constitution of the Communist Party in July, 1945, which the prosecution makes the starting point of the conspiracy, his teaching and advocacy is important. In this book, at page 551, he says:

> "Communists are the chief fighters against the two major threats of violence in modern society—imperialist international war and fascist civil war—both of which emanate from the capitalists. The Communist Party's democratic aims are in line with the writings of Marx, Engels, Lenin, and Stalin, with the course of the every-day struggles of the workers and their allies, and with their world experience in establishing socialism. The danger of violence in the daily class struggle, and in the inevitable and indispensable advance of the workers and the nation to socialism could come only from the capitalist class, which, seeing its profits threatened, and itself being deposed from its rich dictatorship, then uses every means possible to thwart the democratic socialist will of the people. For

19. *Infra*, p. 31 n. 21.
20. *Infra*, Point II.

as the great Marx has truly said, there is no case in history where a ruling class has yielded up its domination without making a desperate struggle.

"Marxist theoreticians, while warning the workers against capitalist violence, have always pointed out possibilities for the peaceful establishment of socialism in countries where the democratic elements are strong. Thus, Karl Marx, three generations ago, before the advent of imperialism, with its highly centralized, heavily armed and bureaucratic state, said that 'If for example, the working class in England and the United States should win a majority in Parliament, in Congress, it could legally abolish those laws and institutions which obstruct its development.' Lenin also, in mid-1917, outlined a peaceful perspective for the Russion Revolution. And Stalin, writing in 1928, while pointing out the danger of capitalist violence at that time, also said that with the strong growth of world socialism, 'a peaceful path of development is quite possible for certain capitalist countries.' The C. P. U. S. A."—that is, the Communist Party, United States of America—"proceeds upon the basis that such a possibility exists in the United States."

In 1949, at page 26 of his book *The Twilight of World Capitalism*, Foster says:

"American socialism, beyond question, will have its own specific forms and methods, but basically it will be the same as socialism in other countries, with monopoly capital completely defeated, the industries and national resources in the hands of the people, production for general use instead of for profit, and the working class the leader of the whole people. Only in this way will this country and the world be finally freed of the dangers of poverty, economic chaos, fascist slavery, and murderous war. These steps could be taken

legally by a people's government, notwithstanding the opposition of the capitalists, however violent.

"To promote the election of a progressive, coalition government of this type which, by force of circumstances, would move to the Left, and eventually to socialism, on the general pattern of the European People's Democracies, is obviously not to advocate a program of force and violence, the enemies of the Communist Party to the contrary notwithstanding."

In a booklet dated January 11, 1948, there was contained a reprint of an interview printed earlier by the New York Herald Tribune about six months before any of the indictments, *Twenty-three Questions about the Communist Party Answered by William Z. Foster.* There he says:

"Q. Does the Communist Party advocate the overthrow of the United States Government by force and violence or by any other unconstitutional means?

"A. [Foster] We'll let the Supreme Court of the United States answer this question for us. In its decision in the Schneiderman case, June, 1943, after examining exhaustively, on the one hand, the charges that the Communist Party advocates a violent seizure of power, and on the other hand, the practices and doctrines of the Party, including the writings of Marx, Lenin and Stalin, the Court said:

"'A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite time in the future, because of peculiar circumstances, constitutional or peaceful channels were no longer open.'"

In a booklet entitled *Socialism, the Road to Peace, Prosperity and Freedom,* published in March, 1951, Foster says:

> "Charges that the Communists advocate violence in this transition from capitalism to socialism are not true. In order that socialism may be instituted the great masses of the American people must be convinced of the imperative necessity of this change, and undoubtedly a gigantic majority can be made to understand that they stand to gain immediately by the introduction of socialism. The masses, once having decided upon establishing socialism, will inevitably turn to the ways of peace and democracy to achieve their legitimate purpose."

In an editorial in the September, 1947 issue of Political Affairs, claimed by the prosecution and admitted by the defendants to be the official theoretical organ of the Communist Party, this statement appears (at p. 779):

> "In a word, to work for socialism is to be profoundly loyal to America. As Americans, we Communists do not want socialism to be limited to the Soviet Union. More than any other nation, America has everything necessary for a free, prosperous, socialist life for all. But as Marxist scientists, who have always fought anarchist adventurism, utopian schemes and putschism, Communists know that the socialist reorganization of society cannot take place until the American working class and its allies among the broad masses of the people desire it, and are ready to bring it about."

In another article in the same official magazine, entitled *The Theory and Practice of the Communist Party,* June, 1947, page 25, the Bill of Rights is supported. Bourgeois democracy is distinguished from and supported as against fascism, and the statement is made "The struggle for de-

mocracy is an indispensable part of the struggle for socialism." Thus the distinction between political democracy and economic capitalism is clearly drawn.

At page 815 of *Political Affairs* for September, 1948, Eugene Dennis, also named as a leading co-conspirator, published a statement entitled "The Fascist Danger", in which he says:

> "As the vanguard party of the American working class, we condemn and oppose the force and violence of capitalism, of imperialism. We oppose its system, its philosophy and its practice of political reaction, exploitation and oppression. We work for the socialist reorganization of society, when the majority of the American working class and people will be the ruling class, and end forever the exploitation of man by man, and crises, wars, reaction and fascism.
>
> "Today when the advocates and practitioners of forcible imperialist expansion and atomic war, or of lynching and police violence, maliciously charge us with conspiring to overthrow the Government, we strongly second the observations of Frederick Engels made half a century ago when Bismarck inaugurated the famous 'anti-socialist' and 'anti-revolt' laws of that time."

Then follows an inner quote from Engels:

> " 'The irony of world history turns everything upside down. We, the "revolutionaries," the "rebels"—we are thriving far better on legal methods than on illegal methods and revolt. The parties of order, as they call themselves, are perishing under the legal conditions created by themselves. They cry despairingly with Odilon Barrot: "La légalité nous tue"—legality is the death of us; while we, under this legality, get firm muscles and rosy cheeks and look like eternal life.' "

The prosecution's main witness, Lautner, has conceded, as indeed he had to, that the article entitled *The Communists and the Fatherland Front*, published in the August, 1940 issue of *Political Affairs*, states accepted Communist doctrine:

> "The Communists, leaning on the people, will build a new Socialist society, not in struggle against the peasants, craftsmen and intelligentsia, but together with them.
>
> In short, it will be the historic work of the entire people. This course of social development, comrades, may, to some, appear slower than the policy of 'take up your arms; hit right and left and set up your dictatorship.' However, the former course is not only possible and realistic, but it is also undoubtedly much less painful for the people.
>
> Hence, we Communists openly state that, in the prevailing circumstances, we chose this very course because it is a realistic and painless road to Socialism."

Perhaps even more controlling than any of the above statments is that which Foster, who was the dominant figure in the Convention of 1945, made in his report to that Convention:

> "The fourth and last false conception that I wish to speak against is the idea being circulated by 'Left' sectarian voices in our Party to the effect that the present program of the Party is only transitory, that we are on our way to a much more Left interpretation of the present national and world situation. According to these comrades, we are going to, or should denounce the war against Japan as imperialist, condemn the decisions of Teheran as unachievable, drop the slogan of national unity, call for a farmer-labor government, give up our wartime no-strike pledge,

abandon the fight for 60,000,000 jobs, bring forward the question of socialism as an immediate issue, and generally adopt a class-against-class policy.

"But these comrades are indulging in wishful thinking. Our Party, if I know it, is not going to take any such Leftist course. For the Party, in its overwhelming majority, understands that Leftist policies of this character would be no less disastrous to us than Browder's Right revisionism. The line of the National Committee's Resolution is the correct one; in its analysis, its formulation of immediate demands, and its placing of the question of socialism. We must hew to the line of that Resolution, taking into account, of course, necessary amendments. We are not getting rid of Browder's Right opportunism to fall into a swamp of 'Left' sectarianism."

The above constitutes not mere oral testimony of defense witnesses but documentary evidence which has not been contradicted anywhere. It demonstrates official Communist teaching.

In the light of these statements, two distinct questions are put. First, how can it be said that the Communist Party of the United States, during the statutory period, not only taught but advocated the "duty or necessity" of violent overthrow of the present Government of the United States? Second, how can it be said that there has been proved an intent to violently overthrow "as soon as circumstances permit"?

To these questions the Government usually makes a number of answers:

1. Some of these statements were issued after the indictment of the Communist leaders. They are "self-serving".

2. Those quotations are merely insincere public propaganda. They were made after the passage of the Smith Act.

3. Those statements contradict the basic tenets of "Marxism-Leninism" upon which, since 1945, the Communist Party of the United States has been based.

The last of these arguments is, of course, the thrust of the Government's case. But before answering that argument, we must meet the first two propositions. As to the first, it is usually pointed out by the Government that any statements made by Foster or others, after the indictment of the Communist leaders on July 20, 1948, are self-serving declarations and may be disregarded. But analysis shows that this position is not tenable. No matter whether Foster's statements vis-a-vis Foster's intent are self-serving, nevertheless on the issue of what the Communist Party taught and advocated vis-a-vis the defendants presently before the Court these statements are not subject to the objection that they are self-serving. If these defendants are bound by what Communists other than themselves say, then these statements also bind them and must be considered in their favor. Besides this, however, the Government's position as to Foster's statements subsequent to 1948 is destroyed by the fact that he said the same thing in 1947, 1945 and 1941, years before the indictment of the Communist leaders.

The Government will probably, secondly, take the position that even as to statements prior to the indictment of the Communist leaders, which are not, strictly speaking, self-serving, they are nevertheless evasive and protective in that they were made subsequent to the passage of the Smith Act in 1940. This fact is plainly immaterial. Even if Foster would prefer to advocate bloody revolution from the housetops but refrained because it would be illegal to do so, that does not alter the fact that he did refrain. If a man does not teach violent overthrow he cannot be punished as if he had done so simply because he refrained out of fear of the law. That is one of the desirable purposes the Smith Act was supposed to achieve. Constructive

treason is no longer the law of the land just as there is no such thing as constructive larceny. If a man would like to steal a watch but is discouraged from doing so because of the law there can be no criminal penalty visited upon him. In this aspect of the case it must be emphasized that we are not dealing with what the Communist Party would like to advocate but with what it did advocate within the statutory period. The indictment does not charge a conspiracy to overthrow but a conspiracy to teach and advocate. And it must be emphasized that the Government has, time and time again, affirmatively proved that the Communist Party's public advocacy is the same as its private advocacy.

And even if Foster were insincere in what he said, the Government cannot assume, while insisting that the present defendants were privy to his statements, that they were also privy to his insincerity in the absence of proof to that effect.

And finally, even if these defendants too were insincere, nevertheless, if what Foster said is what they taught and advocated and what the Communist Party taught and advocated, then their insincerity would have nothing to do with the issue of what was taught and advocated as distinguished from what they might personally intend. In this connection one of the things that Judges Hastie and Maris said in their dissent in the *Mesarosh* case, 223 F. 2d 449, at 464, is material:

> "For it is not a sufficient basis for proscription that the Communists are committed to ultimate violent revolutionary action. If their present tactic is a waiting game, characterized by the teaching of revolutionary theory while incitation to action is left for the indefinite future, the First Amendment prevents the government from proscribing their teaching. Our lawful recourse during such a period lies in the field of education and demonstration which will increase

devotion to our democratic institutions and thus frustrate Communist preachments. There is some risk in such a course. But the adoption of the First Amendment has committed us to it."

Before leaving the issue of whether the Communist Party of the United States, during the period 1949-1952, envisaged a peaceful transition to Socialism, we must consider the "Doctrine of Exceptionalism" as it bears upon that point. The prosecution takes the position that the "repeal" of that doctrine by Lenin necessarily commits the Communist Party to violent overthrow of the United States Government and negates the possibility of peaceful transition. It will be remembered that Marx had seen the possibility of a peaceful change from Capitalism to Socialism in England and the United States. Later Engels added Holland as a third country. But Lenin, in his book on Imperialism, and Stalin later in Problems of Leninism, both discarded that exception and held that although Marx was justified at the time he wrote in believing that Socialism could come peacefully in America, nevertheless times had changed and American Capitalism had grown into a Bureaucracy, the Government was Imperialistic and hence the exception was no longer valid. The prosecution has urged, therefore, that Lenin was teaching and advocating the overthrow of the United States Government as presently constituted by force and violence. But such a view is clearly incorrect. When Marx created an exception in favor of America he believed that the rules applicable to other nations would not necessarily be applicable to America. When Lenin discarded this exception it simply meant that the rules applicable to other countries would also be equally applicable to America. Therefore, the repeal of the Doctrine of Exceptionalism did not mean that the necessity of the preexisting subjective and objective conditions (hereinafter discussed) upon the concurrence of which alone a revolution would be justified was also

repealed. The change that Lenin made simply meant that at the time he wrote peaceful transition was no longer possible but that even if violence had to be undertaken it could not be commenced unless a majority of the people were in favor of it and there were no longer open any parliamentary means in the country whereby relief could be obtained.

While the prosecution welcomes and indeed insists upon this teaching of Lenin that the Doctrine of Exceptionalism is no longer valid, yet it pays no attention to the fact that Lenin has himself been modified by the leaders of the American Communist Party as shown above. The ultimate problem here is really not what Marx or Lenin taught but what the Communist Party of the United States taught and advocated within the period of the statute of limitations. To the extent that Marx or Lenin have been modified, Marxism-Leninism as applied to the Communist Party of the United States has also been modified. Nothing in any of these cases is clearer than that there is no writing of any American Communist of any importance who has within the statutory period advocated resort to force and violence.

This brings us to a consideration of the affirmative aspects of the Government's attempt to prove present advocacy of violent overthrow as soon as circumstances permit. Apparently recognizing that if the teachings of the Communist Party of the United States, during the statutory period, were to be accepted at face value, then there could be no conviction, the Government in each of these cases chooses to go back to pre-conspiracy Communist writings. It necessarily concedes that it could not even hope to sustain its prosecution without them. But it contends that it has the right to do this because the reconstitution of the Communist Party in July, 1945, the draft Resolutions of that year, and the Constitution itself show that it firmly bases itself upon Marxism-Leninism. The

Government then says that Marxism-Leninism constitutes an unequivocal teaching and advocacy of the duty and necessity of violent overthrow as soon as the circumstances permit.[21] In taking this position it seems to us that the Government has confused the teaching of a present right of revolution with a present teaching of a future right of revolution; between a right to revolt under any circumstances and a right to revolt only when peaceful parliamentary change is impossible. Here we reach the heart of the Government's case.

It is now contended that a correct analysis of the evidence produced by the Government in these cases demonstrates that although Marxism-Leninism does advocate a right of revolution, it does not advocate that such right exists irrespective of circumstances but only when the Government is either wilful or apathetic *and* parliamentary means whereby change might be accomplished are no longer available *and* there is majority support for the revolutionary step. This doctrine includes a recognition that a revolt at such time will be accompanied by violence.

It seems perfectly clear that in the United States of America, as presently constituted, the Government is not tyrannical, and peaceful constitutional change by parliamentary means is completely open. According to the testimony, there has never been a scintilla of evidence that Marxist-Leninists contend otherwise. They do say that

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21. This despite the fact that the self-same Constitution provides in Article IX, Section 2 as follows:

> "Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion."

Louis Budenz, usually testifies that this was inserted as protective or "Aesopian" language which he happened accidentally to find out about by hearing two Communist leaders speak of it. How this esoteric knowledge can be imputed to present defendants escapes us.

the United States is a Bourgeois Dictatorship,[22] and that it is bureaucratic and imperialistic. But nowhere have they ever claimed that these factors warrant revolt even by a majority of the people. Their proposed substitute or the desirability of the proposed change is not involved. The sole question under the Smith Act is the method by which they hope to gain their goal.

It is suggested that the closest analogy to the Marxist view on the "right of revolution" is our own Declaration of Independence.[23] Indeed, the Declaration went further than the Marxists go. There, although our forefathers limited the right to revolt to circumstances which warranted revolution, they proceeded to to demonstrate that those conditions then existed, thus warranting immediate action. The Marxist view sets up much the same preconditions but does not say that they presently exist in the United States but only that the right of revolution will ripen if and when they come to exist.

The Declaration exactly expresses a principle central to Marxism-Leninism when it states that one of the "self-evident" truths is that "whenever any form of government becomes destructive of these ends [life, liberty, pursuit of happiness], it is the right of the people to alter or abolish it." Another passage of the Declaration is an even better expression of this principle: "But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them [the people] under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security."

Similarly, John Locke had said in his *Two Treatises of Civil Government*:

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22. "Dictatorship" whether applied to the Bourgeoisie or Proletariat simply means "Rule by and in the interest of".

23. It is common knowledge that Marx and Lenin borrowed freely from the architects of American political theory.

"Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going, it is not to be wondered at that they should then rouse themselves, and endeavor to put the rule in such hands which may secure to them the ends for which government was at first erected. . . ."

And so Lenin, in his work entitled *War and the Second International,* International Publishers edition, 1932, page 13, says:

"For a Marxist there is no doubt that a revolution is impossible without a revolutionary situation; furthermore, we know that not every revolutionary situation leads to revolution.

"What are, generally speaking, the characteristics of a revolutionary situation? We can hardly be mistaken when we indicate the following three outstanding signs: (1) it is impossible for the ruling classes to maintain their power unchanged; for there is a crisis 'higher up,' taking one form or another; there is a crisis in the policy of the ruling class; as a result, there appears a crack through which the dissatisfaction and the revolt of the oppressed classes burst forth. If a revolution is to take place, it is usually insufficient that 'one does not wish way below,' but it is necessary that 'one is incapable up above,' to continue in the old way; (2) the wants and sufferings of the oppressed classes become more acute than usual; (3) in consequence of the above causes, there is a considerable increase in the activity of the masses who in 'peace time' allow themselves to be robbed without

> protest, but in stormy times are drawn both by the circumstances of the crisis and *by the 'higher-ups' themselves* into independent historic action.
>
> Without these objective changes, which are independent not only of the will of separate groups and parties but even of separate classes, a revolution, as a rule, is impossible. The co-existence of all these objective changes is called a revolutionary situation."

It seems perfectly clear that in no Smith Act case has there been adduced any proof that the Communist Party of the United States contends that a "revolutionary situation" presently exists in America or that they expect it will exist in the forseeable fufure.

Similarly in *Lenin's Selected Works*, Volume VI, page 293, under the title *Can the Bolsheviks Retain State Power*, the following appears:

> "If a revolutionary party has not a majority among the front ranks of the revolutionary classes and in the country generally, there can be no question of insurrection."

Also in *State and Revolution, Lenin Collected Works*, Vol. XXI, bk. II, p. 180, he says:

> "If we take for examples the revolutions of the Twentieth century, we shall, of course, have to recognize both Portuguese and Turkish revolutions as bourgeois. Neither is a people's revolution, inasmuch as the mass of the people, the enormous majority, does not make its appearance actively, independently, with its own economic and political demands in either the one or the other."

Equally fundamental is Lenin's basic limitation upon the right to use violence: "in order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used

against the masses there is no other road to power. We are not Blanquists; we are not in favor of the seizure of power by a minority." *Lenin, Collected Works,* Volume VI, p. 29.

Government witnesses, such as Budenz, agree that the Communists accept the famous statement of Lenin in "War and the Workers" wherein he states:

> "We say that experience will suggest to them, and the whole people will see, that there is no other way out. We do not want to 'usurp' power for the whole experience of revolution teaches that only a power that is backed by the majority of the people can be durable. Consequently the 'usurpation' of power would be merely an adventure; and our Party would not agree to anything of the kind."

Indeed, to the objective preconditions, without which no revolution can take place, Lenin added certain subjective conditions [24]

It is certainly a fair inference that the subjective conditions of which Lenin spoke meant a strong Communist Party so that even granted the objective conditions that come about independent of the will of the people (or any class) it does not mean that a people's revolution will follow. But on the other hand it does not mean that if there

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24. In *War and the Second International, supra,* the text goes on:

"The co-existence of all these objective changes is called a revolutionary situation. This situation existed in 1905 in Russia and in all the periods of revolution in the West, but it also existed in the seventh decade of the last century in Germany; it existed in 1859-1861 and in 1879-1880 in Russia, though there was no revolution in these latter instances. Why? Because a revolution emerges not out of every revolutionary situation, but out of such situations where, to the above mentioned objective changes, subjective ones are added, namely, the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break (or to undermine) the old government, it being the rule that never, not even in a period of crises, does a government 'fall' of itself without being 'helped to fall.'"

is a Communist Party, no matter how strong, that there can be a violent revolution without the existence of the objective preconditions.

In Stalin's *Foundations of Leninism*, p. 44, we find this idea:

> "At the same time, however, it must be borne in mind that the overthrow of the bourgeoisie can be successfully accomplished only when certain absolutely necessary conditions exist, in the absence of which there can even be no question of the proletariat taking power.
>
> Here is what Lenin says about these conditions in his pamphlet *'Left-Wing' Communism, an Infantile Disorder*:
>
> The fundamental law of revolution, which has been confirmed by all revolutions, and particularly by all three Russian revolutions in the twentieth century, consists in the following: it is not enough for revolution that the exploited and oppressed masses should understand the impossibility of living in the old way, and demand changes; for revolution it is necessary that the exploiters should not be able to live and rule in the old way. Only when the 'lower classes' do not want the old way and when the 'upper classes' cannot carry on in the old way—only then can revolution triumph. This truth may be expressed in other words: Revolution is impossible without a nation-wide crisis (affecting both the exploited and the exploiters). It follows that for revolution it is essential, first, that a majority of the workers (or at least a majority of the class conscious thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it; secondly, that the ruling classes should be passing through a governmental crisis which would draw even the most backward masses into politics . . . weaken the government and make

it possible for the revolutionaries to overthrow it rapidly."

Perhaps the controlling, indeed the crucial, statement of the limitations upon permissible resort to violence is to be found in *Lenin's Selected Works*, Vol. VI, p. 321, generally acknowledged by all prosecution witnesses to constitute present Communist doctrine:

> "'Marxism is an extremely profound and many-sided doctrine. It is, therefore, not surprising that scraps of quotations from Marx—especially when the quotations are not to the point—can always be found among the "arguments" of those who are breaking with Marxism. A military conspiracy is Blanquism—'"
>
> "'—If its organizers have not reckoned with the political situation in general and the international situation in particular; if the Party in question does not enjoy the sympathy of the majority of the people as proved by definite facts; if the advanced workers are not convinced of the desperate situation of the masses and of the support of the countryside, as demonstrated by an energetic peasant movement, or by a revolt against the landlords and against the government that defends the landlords; *if the economic situation in the country offers any real hope of a favorable solution of the crisis by peaceful and parliamentary means.*'" (Emphasis supplied.)

When there is added to this analysis the fact that all American Communist writers during the period covered by the statute of limitations and for many years prior thereto have envisaged the possibility of peaceful transition to Socialism (as previously noted), it would seem plain that Marxism-Leninism as that term is used in the Constitution of the Communist Party of the United States and as applied to the present cases is not an unequivocal advocacy

of violent overthrow of the United States government while parliamentary means for change remain open. Indeed, there is no teaching or advocacy of any necessity that a revolution take place violently at all and certainly not that such a violent revolution take place as soon as circumstances permit.

Two further considerations remain:

First, the government will probably contend that some Marxist-Leninist writings indicate that the revolutionary step can be taken without a majority or that the Communists may wrongly decide at some future date that they have majority support. But, even if there are additional quotations that indicate the possibility or the desirability of taking the revolutionary step without a majority still, would it be fair to impute such a view to these defendants rather than that shown by the overwhelming evidence of the requirement that there be a majority? The defendants ought not be held vicariously liable for one or two contradictory statements where the clear import of Marxism-Leninism is that majority support is essential.

Much useless time is spent in Smith Act prosecutions on the issue of who decides whether there is a majority. On the one side it is contended that the Communist Party as the vanguard of the Proletariat arrogates to itself the right to decide that. On the other hand, it is urged that as in America and in France it will be the people themselves who decide. But since it is perfectly clear that the present teaching of Marxism-Leninism claims no right to make such decision by less than a majority and only after parliamentary means are closed and balloting is impossible, it is of no consequence that it is possible that the vanguard will deny their teaching and practice Blanquism which they profess to abjure.

But even if we were wrong in this argument and it could fairly be said that present Communist teaching is that action may be taken without majority support, nevertheless there still remains the proposition that no action is

contemplated unless and until parliamentary means are closed and hence, in the United States today, the Communist Party does not advocate action or overthrow "as soon as circumstances permit." Even if there is reason to believe that when the time comes they will be untrue to their teaching or that their teaching will change still it is their teaching and advocacy during the indictment period alone which is the governing factor in the present context. If they do change it, then the government need not any longer wait for the match to be put to the fuse or for the revolution to start. It can nip the whole thing in the bud as soon as it is made to appear that the advocacy itself has changed. But until that occurrence it is submitted that these convictions ought not to stand.

Secondly: The prosecution in these cases is able also to quote some excerpts which picture the violence which takes place once the revolution begins.

It would appear that the government in the many excerpts from Marxist writers that have been introduced in evidence has failed to distinguish between violence exerted to gain the dictatorship of the proletariat and violence thereafter exercised by the dictatorship of the proletariat; or between violence against a functioning parliamentary government and violence against governmental apparatus where no parliamentary means are open. If these distinctions are kept in mind it will be seen that the many horrendous quotations put into evidence by the government mean one thing when considered in isolation and quite another when considered in their context. The proletarian revolution is not a one step process. There are at least two phases: (1) the proletariat must gain control of the power of the state and (2) the proletariat must so use that power as to convert the society into a classless society which ultimately ends up without governmental apparatus or police power. Most of the horrendous phrases refer to the state of affairs in which the working classes, having already gained control of the government, oppress the dethroned

bourgeoisie. It is apparent that this phase must be violent because the overthrown bourgeoisie will not peacefully submit to what they regard as gross injustice. But good or bad the action of the dictatorship at such a time is at least de facto governmental action.

But all of these excerpts must be carefully read to see whether in any instance the Marxist-Leninists have abandoned the proposition that the objective conditions plus majority support which constitute the revolutionary situation are necessary. The one invincible hurdle over which the prosecution cannot get is that no Communist, from Marx to the present day, has ever advocated the right of the people unanimously or a majority or a minority to overthrow a government by violence while peaceful legislative constitutional or parliamentary means are open. Hence, the dissent of Judges Hastie and Maris in the *Mesarosh* case, 223 F. 2d 449, would seem to be correct in holding that in that case the advocacy, no matter what it was and whether dangerous or not was not "calculated to incite men to violence as soon as circumstances will permit." The dissent there said at p. 461:

> "A Marxist group may lawfully attempt to persuade people to believe unreservedly that the writings of Marx and Lenin and similar dogma constitute the only acceptable guide to struggle for a desirable kind of society. This must be coupled with some call to unlawful action against the government to make the conduct punishable. But a call to action in the indefinite future is a meaningless contradiction of terms. Some meaningful orientation in time, whether by a specification of the time when action is to be taken or otherwise, is an essential part of every call to action. Thus, the government has found it necessary here, as in the Dennis case, to charge a design to cause violent action as soon as circumstances will permit, in order to establish requisite incitation beyond indoctrination with revolutionary political theory."

The dissent then pointed out by reference to the testimony of Lautner who has become the government's chief witness in all of these cases that its proof did not justify a conclusion that Communist doctrine sought overthrow of the existing government as soon as possible.

The question of the sufficiency of the evidence on the proposition herein advanced has never been decided by this Court. The closest approach to it was in *Schneiderman v. United States*, 320 U. S. 118. There the Court considered whether the evidence was sufficient to show that Schneiderman was not attached to the principles of the Constitution at the time he was naturalized. The Court had before it for analysis the main treatises of Marxism-Leninism, viz., the State and Revolution of Lenin, The Statutes, Theses and Conditions of Admission to the Communist International, The Theory and Practice of Leninism, by Stalin, The Program of the Communist International, adopted in 1928, Why Communism by Olgin, Left Wing Communism, by Lenin, A. B. C. of Communism, by Bucharin and Preobrazhensky, Leninism, by Stalin, Lenin's Selected Works, the various Constitutions of the Communist Party of the United States, original Program and Constitution of the Workers Party of America, predecessor of the Communist Party of the United States, and various other tracts, pamphlets, magazines, etc.

After a full and comprehensive consideration of the whole body of doctrine presented to it this Court concluded:

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time

> because of peculiar circumstances constitutional or peaceful channels were no longer open."[25]

Then the Court concluded that if those tenable conclusions were in fact the principles upon which the Communist Party stood they were not unlawful and one could hold them and still be attached to the Constitution of the United States.

Thus it is seen that it is lawful (a) for a de facto government to use force and violence to preserve itself; or (b) for a majority of the people to overthrow a government if and when there are no longer open legislative or parliamentary means for imperative change.

In the story of Smith Act prosecutions commencing with what is known as the first Foley Square trial, only the first of these contentions has been considered. In *United States v. Dennis*, 183 F. 2d 201, the Court said (183 F. 2d 206):

> "They [the defendants] say that the use of 'force and violence' is no part of their program, except as it may become necessary after the proletariat has succeeded in securing power by constitutional processes. Thereafter, being itself the lawful government, it will of course resist any attempt of the ousted bourgeoisie to regain its position; it will meet force with force as all governments may, and must."

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25. The Court's statement was accepted by Foster and promulgated as Communist doctrine. In "Twenty-Three Questions", referred to above p. 22 the following appears:

> "We Communists accept this formulation as a fair statement of our attitude toward the question of political violence. American Communists have always recognized the historical fact that parties with advanced social programs cannot secure governmental power by conspiratorial methods or by minority *coups d'état*. They must have with them an overwhelming majority of the population. The danger of violence in such situations always comes from the reactionary elements, who refuse to bow to the democratic majority will."

The Court then said, however, that this was not a correct interpretation and that the defendants as shown by the record did not "mean to confine the use of 'force or violence' for the protection of the political power, once lawfully obtained." In our analysis we have agreed with this statement. But, having said this, the Court did not then proceed to consider upon what additional theory the Communists justify violence, i.e. the Court did not consider the second branch of the Marxist-Leninist concept of violent revolution as it had been recognized by this Court in the *Schneiderman* case and which is fully supported by numerous quotations stated therein and in the above argument. Up until now all courts, including this Court, have been content once they arrive at the conclusion that Marxism-Leninism advocates the duty and necessity under certain circumstances of using force and violence not to inquire further (a) as to what those circumstances are, and (b) when the force and violence may be properly used.

It is respectfully submitted that the record in the present case does not support the proposition that either the petitioners or the Communist Party of the United States, during the statutory period, advocated the necessity or duty of violent revolt. Additionally, the record supports no conclusion that petitioners had the intent to overthrow the government as soon as circumstances permit.

II. Incompetent and Irrelevant But Inflammatory or Otherwise Prejudicial Evidence Admitted Against the Defendants in This and Other Recent Smith Act Cases Deprived Them of a Fair Trial and Violated Their Constitutional Rights Under the First, Fifth and Sixth Amendments.

In Smith Act proceedings in the lower federal courts, the loose standards for scrutiny of the sufficiency of the prosecution's evidence have been matched by loose standards of its admissibility. Examples are numerous in the four cases now pending in this Court.

In the *Yates* case, much of the evidence offered to prove the Party's unlawful aims consisted of third party declarations outside of the presence and without the knowledge of any petitioner.[26] In the *Mesarosh* case, the prosecution witness John Lautner was allowed to testify to items of instruction at a Communist training school in Hungary which he (but none of the petitioners) attended in 1930, fifteen years before the inception of the conspiracy charged in the indictment.[27] In the *Scales* case, the witnesses Lautner and Clontz testified to numerous acts and declarations of third persons that did not take place in Scales' presence, and the court received lengthy and utterly irrelevant testimony about Communist views on such matters as "the Negro question" and the Korean war which, considering the time and place (Greensboro, North Carolina) of the trial, were highly inflammatory.[28] In the *Lightfoot* case, once again Lautner (as well as other witnesses) was allowed to give extensive testimony based on declarations in no way binding on the petitioner in that case.[29]

Unquestionably the most important issue raised in these cases is the admissibility of third-party declarations about the objectives advocated by the Communist Party. Under Smith Act conspiracy indictments against Communists, the prosecution must prove both that the Party was organized to advocate violent overthrow, and that the defendants knew that such was the Party's purpose. If a Party member is shown to have believed that the Party's aims are violent, but there is no proof that the Party in fact advocates violence, there is no criminal liability and no clear and present danger. If it is shown that the Party advocates violence, but there is no proof that the defendant

26. Petition for Certiorari, p. 57; Petitioner's Reply Brief, pp. 22 and 30.

27. See the Petition for Certiorari at pp. 31-35, where this and numerous other examples are drawn from Lautner's testimony.

28. See the Brief in No. 29, at pp. 41-43.

29. See the Brief in No. 32, pp. 67-74.

knew of or shared in this aim, then the essential elements of guilty knowledge and intent are lacking.

Can the prosecution prove the Party's violent aims by evidence of the statements of individual Party members, made in the absence and without the knowledge of the accused, even though the issue of guilt under the Smith Act relates only to the Party's aims *as known to the accused?* As in the four cases now before this Court, the lower federal courts have generally allowed such third-party evidence, despite the objections of the defense. The courts (and the Government here) seek to support the admissibility of such evidence on two distinct grounds.

Firstly, reliance is placed on the rule that declarations of co-conspirators are admissible against them, even though not made in each other's presence. See, *e.g., United States v. Dennis*, 183 F. 2d 201, 229. But this argument is both insufficient and fallacious for at least three reasons:

(a) Third-party evidence of the Party's aims was offered and received in the so-called "membership" cases (*Scales* and *Lightfoot*), where no conspiracy was charged and no co-conspirators were named. In these cases, it is obvious that the rule governing co-conspirators' declarations is inapplicable.

(b) In the conspiracy cases, third-party declarations about the Party's aims are offered and received even though the declarants were not named or charged as co-conspirators. Lautner, Budenz, Crouch and others who gave this type of testimony (largely recitals of their own prior teachings) were not charged or named as co-conspirators in any of these cases. Nor can the Government now contend that they were in fact co-conspirators though not named as such, for these witnesses were well known to the Government in advance of trial, and under the Sixth Amendment the defendants are entitled to be informed in the indictment of the charge of conspiracy with anyone

upon whose conduct or declarations as co-conspirator the prosecution proposes to rely. *Cf. Cruikshank v. United States*, 92 U. S. 588; *United States v. Scott*, 74 F. 2d 213.

(c) Even as to the declarations of co-conspirators, the Government's contention is unsound. For declarations of co-conspirators are not admissible against each other (if not made in each other's presence or with each other's knowledge) until the existence of the conspiracy has first been established by other evidence. "Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made." *Mayola v. United States*, 71 F. 2d 65, and numerous other cases cited therein in support of this well-established proposition. But in the Smith Act conspiracy cases, such declarations are offered and (erroneously) received to establish the conspiracy itself. The Government is tugging at its own boot-straps, for there is no independent evidence of the conspiracy. The mere fact of common membership in the Communist Party obviously will not suffice, for the Party is not the conspiracy charged in the indictment. Nor does evidence of Party "activities," of the type generally shown in these cases, help the Government's position, for these are simply the normal attributes of membership.[30] The prosecution must first establish, by evidence which is competent by the usual evidentiary standards, that the accused and the co-conspirators were parties to an *agreement* "to do an unlawful act, or to do a lawful act by unlawful means". See *Mulcahy v. Regina*, L. R. 3 H. of L. 306, 317. Only then are the declarations of the co-conspirators chargeable against each other.

Accordingly, the rule pertaining to co-conspirators' declarations gives no support to the admissibility of third-party declarations about Party teachings, and the Govern-

30. *Supra*, p. 10.

ment is obliged to fall back on a second line of argument. There are two distinct factual issues, we are told: whether the Party *in fact* advocates violent overthrow, and whether the defendant *knows* that fact, if fact it be. Third-party declarations, it is argued, are admissible to prove that the Party in fact advocates violent overthrow, and then other evidence directly touching the defendant may be adduced to show his knowledge of the fact. See, *e.g., Scales v. United States,* 227 F. 2d 581, 589. But this analysis, superficially plausible, does not meet the actualities of the Smith Act trials.

In many law suits, of course, it may be important to establish the existence, non-existence, or nature of a circumstance in the observable world. The location and dimensions of a building, the height and weight of a man, the effective range of a revolver, the color and maximum speed of an automobile—such matters, we may assume at least for purposes of argument, may be shown by evidence regardless of whether or not the affected litigant is privy to it, and then the litigant's knowledge of the fact, if relevant, may be shown by evidence directed to his state of mind.

What, if anything, an organization advocates is ordinarily shown by its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations. If in Smith Act cases against Communist Party members, the prosecution should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time. Of course, it would still have to be shown that the defendant knew of the pertinent pronouncements, but ordinarily this would not be difficult if the pronouncements were of such a nature that they would come to the attention of all Party members as a matter of routine.

But it is not by any such means that the Government has endeavored to prove the unlawful advocacy of the Communist Party. This is for the very simple but sufficient reason that the Party's official pronouncements do not advocate, and indeed expressly condemn the advocacy of, violent overthrow of the Government. The conspiracy charged in all these indictments is said to have been hatched at the time of the Party's reconstitution at its 1945 national convention. But the Party constitution adopted at that convention explicitly repudiates force and violence, and in 1948 it was revised to provide for the expulsion from the Party of any member "who advocates force and violence or terrorism."[31] Far from relying on the Party's official pronouncements, the Government's contention is that they are meretricious and self-serving disclaimers, and that the Party's actual purposes must be ascertained from other evidence. And this "other evidence" consists almost entirely of the very third-party declarations—whether in "classical" texts by Marx, Lenin, and Stalin (the burden of which is discussed in point I B, *supra*), or in the opinion and hearsay testimony of witnesses such as Crouch, Budenz, and Lautner—the admissibility of which is presently in question.

In approaching this question it is important to bear in mind what has already (*supra*, p. 28) been remarked: that the petitioners and other defendants in Smith Act cases are not charged with conspiring to overthrow the Government,[32] but to *advocate* the duty and necessity of its overthrow. Conceivably the leaders and many members of the Communist Party may in fact intend and attempt to bring this about. But the question is whether they propose to

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31. See, *e.g.*, the petition for certiorari in the *Mesarosh* case at p. 21.

32. There is a federal statute prohibiting conspiracies to overthrow the Government by force (18 U. S. C. 2384), but this is not the statute under which petitioners and the *amici curiae* have been indicted.

do this (at least in part) by means of advocacy. And this is not lightly to be assumed, for it is altogether probable that governments are more often overthrown by conspiracies, juntas, or movements which do not (at least openly) advocate violent overthrow, but proclaim their desire to protect the governments against the assaults and machinations of others.

If advocacy of violent overthrow is the only "substantive evil" at which the Smith Act is directed, and if (as is clear) the Communist Party established in 1945 does not in its official pronouncements so advocate but explicitly condemns such advocacy, the prosecution's charge against the petitioners and other Communist defendants in Smith Act cases comes down to this: that despite the categorical and contrary import of the Party's official pronouncements, the petitioners and other Party co-conspirators *secretly* advocated violent overthrow among themselves and, perhaps, to others. And indeed this is precisely what the prosecution attempts to prove by means of the third-party declarations that are here under discussion.

But as soon as the issue is cast in this, its true shape, the incompetence and inadmissibility of the third-party declarations become apparent. If it is secret advocacy in contravention of open Party doctrine that is the basis of the charge, then it cannot be proved as against Party member A by what member B said to member C in A's absence. Nor can it be proved against member A by what member D wrote in a book, unless it is shown that A had read and understood the writing and knew it to embody the secret advocacy of the Party leadership. In fact, the issue is no longer "Party advocacy" in the customary organizational sense, but the secret advocacy of a conspiracy within the Party. Membership in that conspiracy can not be proved against an individual by evidence of his membership in the Party, or by hearsay evidence of what other members were saying to each other or writing in books.

The *Kuzma* case offers a prime example of the vice of admitting evidence of this type. Article IX of the Party constitution contains the provision for the expulsion of members who advocate force and violence. The witness Budenz testified that this provision was "aesopian". Asked how he knew this, Budenz testified that he learned it at a meeting attended by Eugene Dennis and John Williamson but by none of the defendants in the *Kuzma* case! Presumably if Budenz had been ill that day, he himself would not have known that this provision was "aesopian". Yet this testimony was admitted against the *Kuzma* defendants as "evidence" to prove the unlawful aims of the Party.

Comparable examples are sown throughout the records of the Smith Act cases now before the Court, and the others now on trial or appeal. There is much more at stake here than errors by the trial courts in rulings on evidence. For in fact the issues of evidentiary sufficiency (Points 1A and 1B, *supra*) and admissibility are simply different facets of the basic constitutional problem.

In this day and age, it is trite to remark that the constitutional impact of a statute is to be gauged not only by its words but by the facts to which the Government seeks to make it applicable. The *Dennis* case itself is a striking example of this Court's awareness that a statute fair in one aspect may be foul in another. And it is equally apparent that the evidentiary practices that are attached to a law may decisively affect its constitutional application.

The Smith Act, as applied in current trial practice in the federal courts, creates especially grave perils to free speech because of the apparently limitless scope of the "evidence" for which the defendants are being held answerable. The theory which now governs the trial of these cases creates an extraordinary and dangerous situation. Congress has expressly declared, in accordance with the Constitution, that it is not a crime—indeed it is simply the exercise of the constitutional rights of speech and press and assembly—to be a member of the Communist Party

and participate in its activities. But under evidentiary rulings such as we have reviewed, these rights are exercised only subject to terrible and undefined hazards. One may be convicted through the declarations of strangers, living and dead, solely because of their membership and activity in the Party. The metes and bounds of the Act, in terms of guilt or innocence, become so vague and far-reaching as plainly to trespass not only on the First Amendment, but on the due process clause of the Fifth Amendment as well. The individual defendant is deprived of any real opportunity to defend himself against the charge of sedition, and the administration of federal justice is poisoned.

Other and equally vicious consequences follow as a matter of course. The range of admissible "evidence" is stretched ever farther into the past, and defendants indicted after 1950 for a conspiracy alleged to have originated in 1945 find themselves saddled with the onus, before the jury, of what Paul Crouch has to say about his adventures in Moscow in 1928. (as in the *Kuzma* and *Fujimato* cases), or what Lautner was told in Hungary in 1930 (as in the *Mesarosh* case).[33] Irrelevant and incompetent but highly inflammatory and otherwise prejudicial evidence floods the record, and a North Carolina jury (in the *Scales* case) is regaled with testimony that the Communist Party proposes to establish a Negro nation "concentrated in Virginia, North Carolina, South Carolina, and down throughout the South."[34]

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33. In *Krulewich v. United States*, 336 U. S. 440, it was held that co-conspirators' declarations are inadmissible unless made in furtherance of the conspiracy. Obviously, statements such as those of Crouch and Lautner, occurring as they did over 15 years before the alleged formation of the conspiracy and 10 years before the passage of the Smith Act, could not be in furtherance of its purposes. *Cf. Fiswick v. United States*, 329 U. S. 211. Even statements by the defendants themselves should not be admitted if too remote in time from the formation and operative period of the conspiracy, and the examples given in the text are nothing if not remote.

34. See the brief in the *Scales* case, at p. 42.

In the midst of the passions and dangers of these times, there is no field of federal criminal law in which the courts should be more determined to preserve to the accused his procedural and substantive rights than in these Smith Act cases. Unhappily, the trend has been toward abdication rather than fulfillment of judicial responsibility. Review and correction by this Court is urgently needed.

CONCLUSION.

The *amici curiae* respectfully join in petitioners' prayer that the judgments below be reversed.

Dated: September 11, 1956.

Respectfully submitted,

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SUPREME COURT, U.S.

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Argument	27
I. The courts below erred in excluding the questions of res judicata and collateral estoppel from the case made against petitioner and in permitting respondent to relitigate factual determinations previously and finally decided adversely to respondent in the litigation between respondent and petitioner in Schneiderman. There was no different and additional testimony in this record sufficient to sustain the conviction here or to avoid the conclusive effect of the judgment in Schneiderman	27
Conclusion	40

Table of Authorities Cited

Pages

Baumgartner v. United States, 322 U.S. 665 38

Communist Party v. Peek, 20 C. 2d 536, 127 P. 2d 889 (1942) 20
Coffey v. United States, 116 U.S. 436 28
Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 28

De Jonge v. Oregon, 299 U.S. 353 38
Duncan v. Gegan, 101 U.S. 810 34

Frank v. Mangum, 237 U.S. 309 28

Gelston v. Hoyt, 3 Wheat. (U.S.) 246 28

Hartzel v. United States, 322 U.S. 680 38
Herndon v. Lowry, 301 U.S. 242 38

Local 167 International Brotherhood of Teamsters v. United States, 291 U.S. 293 37

Kammann v. United States, 259 Fed. 192 (C.A. 7, 1919) ... 39
Kannel v. Kennedy, 94 F. 2d 487 (C.A. 3, 1937) 34
Klapprott v. United States, 335 U.S. 601 29

L. & N. Ry. Co. v. Ohio Valley Tie Co., 242 U.S. 288 28
Larkin Automotive Parts Co. v. Bassick Mfg. Co., 19 F. 2d 944 (C.A. 7, 1927) 34
Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683 37

New Orleans v. Citizens Bank, 167 U.S. 371 (1897) 28, 37

Schneiderman v. United States, 320 U.S. 118 ..... passim
Sealfon v. United States, 332 U.S. 575 ..... 28, 37, 38
Sewerage Comm. of City of Milwaukee v. Activated Sludge, 81 F. 2d 22 (C.A. 7, 1936) 34
So. Pac. Co. v. United States, 168 U.S. 1 ..... 28, 34, 39
Steele v. United States, 267 U.S. 498 28
Stromberg v. California, 283 U.S. 359 37

United States v. Adams, 281 U.S. 202 28
United States v. B. & O. R. R. Co., 229 U.S. 244 38

Pages

United States v. Munsingwear, 340 U.S. 36 28
United States v. Oppenheimer, 242 U.S. 85 ..... 28, 39
United States v. Williams, 341 U.S. 58 28

Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 37
Wolf v. United States, 259 Fed. 388 (C.A. 8, 1919) 39

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

PETITION OF WILLIAM SCHNEIDERMAN FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

William Schneiderman respectfully petitions that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Ninth Circuit (Record p. 802) affirming the judgment of conviction herein of the District Court for the Southern District of California, Central Division.[1]

OPINIONS BELOW.

The opinions of the Courts below are noted in the Yates petition and joint appendix.

JURISDICTION.

The jurisdictional statement is the same as that in the Yates petition.

QUESTIONS PRESENTED.

1. On behalf of petitioner Schneiderman, the questions presented in the Yates petition numbered "1", "2", "3", "4", "5", "6", "7", "8" and "9" are adopted by reference here as if fully set forth at length, and made a part of this petition.

2. Whether as to petitioner Schneiderman the respondent was estopped to relitigate the following factual determinations previously and finally decided adversely to respondent in the litigation between respondent and

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[1]The separate petition of Yates et al. in the above-entitled matter, referred to herein as the "Yates petition", and the joint appendix thereto, sets forth matters equally applicable to all petitioners, including the petitioner Schneiderman. In order to avoid unnecessary duplication, such matters are adopted by reference as noted in this petition without further discussion.

petitioner in *Schneiderman v. United States* (320 U.S. 118): (a) that a tenable conclusion is that the principles of Marxism-Leninism do not include the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; (b) that the advocacy and teaching by the Communist Party of the principles of Marxism-Leninism are not equivalent to the advocacy and teaching by the Party of the overthrow and destruction of the Government of the United States by force and violence; (c) that in and because of the absence of clear, convincing and unequivocal proof of overt acts indicating that petitioner interpreted the program of the Party unlawfully, the membership and officership of the petitioner in the Party, did not and do not justify inferences or permit findings that petitioner knew that the Communist Party advocated the forcible overthrow of the Government and intended to so teach and advocate with the intent to forcibly overthrow the Government at any time.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the Yates petition and the joint appendix.

STATEMENT OF THE CASE.

So much of the Statement of the Case which appears in the Yates petition and is equally applicable to all petitioners is adopted here by reference and not repeated.

1. The petitioner here is the same petitioner who was before this Court in *Schneiderman v. United States*, 320 U.S. 118. That portion of the transcript of the record which included petitioner's own testimony in the District Court in December, 1939 in the aforesaid litigation was admitted into evidence in the instant case (Exhs. MM-1, MM-2; R. 1.1730-1).[2] The trial judge refused, however, to apply the principles of res judicata or collateral estoppel to any issue in the case, specifically excluding the entire question from the trial, a ruling which was upheld by the Court of Appeals (Appendix A, pp. 21-2),[3] The question was seasonably raised by motion before trial (Clk. R. p. 8 , by objections to the introduction of evidence (R. 516), by motions to rike evidence (R. 731; Clk. R. p. 177) and by requested instructions (App. Item 2q, p. 79),[4] The entire transcript of the record in the prior

[2]The exhibits admitted into evidence exceeded 500 in number and included many full length books. The Court of Appeals pursuant to stipulation of the parties and its order based thereon considered the exhibits on appeal in their original form without printing or reproduction. Copies of the Reporter's Transcript were prepared by a process known as photo offset printing and these copies were by order of the Court of Appeals accepted as the reporter's record on appeal without further printing. The letter "R" refers to the photo offset copies.

[3]That Court's opinion is set out as Appendix A to this and companion petitions herein.

[4]Each party filed printed appendices setting forth selected portions of the reporter's record. The appendix to appellants' brief was divided by subject matter into items with each item given a number. The appellants' appendix is referred to herein as "App. Item" followed by the number of the item and the page numbers in said appendix.

proceedings was offered into evidence and rejected (Exs. MM-1, MM-2; R. 11,937).[5] Also offered into evidence, and rejected, were the mandate of this Court dated July 20, 1943 (Ex. MM-3 for ident.; App. Item 105, pp. 391-3; R. 12529-30); the subsequent mandate of the Court of Appeals dated July 30, 1943 and the endorsement of the Clerk of the District Court indicating that the mandate had been filed and spread on the minutes of the District Court on August 30, 1943 (Ex. MM-4, App. Item 105, pp. 394-5; R. 12529-30), and the record of the District Court dated August 30, 1943 indicating the return to petitioner's counsel of petitioner's naturalization certificate theretofore surrendered in the action (Ex. MM-5, App. Item 105, p. 397; R. 12529-30).

In the trial herein, as in *Schneiderman*, one of the categories of proof adduced by respondent in support of the charge contained in the indictment was Marxist-Leninist literature. The theory of respondent was that a distillation of such writings by the trier of the facts would leave a residue of "principles", one of which principles was the overthrow and destruction of the present Government of the United States by force and violence. To support its premise that the literature was susceptible of this and no other interpretation, the respondent, as in *Schneiderman*, introduced into evidence certain documents considered basic in support of its position, and read excerpts therefrom. The basic documents were: (1) Constitution of the Communist Party of the United

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[5]The Court of Appeals stated that the record was not introduced into evidence (Appendix A, pp. 21-2). It was not introduced because an objection by respondent to its introduction was sustained (R. 11,937).

States (Ex. 5 in *Schneiderman;* Ex. 27 here); (2) 1928 Program of the Communist International (Ex. 6 in *Schneiderman*; Exs. 59 and 60 here); (3) Communist Manifesto (Ex. 7 in *Schneiderman*; Ex. 39 here); (4) State and Revolution, by V. I. Lenin (Ex. 8 in *Schneiderman;* Exs. 11 and 35 here); (5) Left-Wing Communism, by V. I. Lenin (Ex. 9 in *Schneiderman*; Ex. 503 here); (6) Program of the Young Communist International (Ex. 10 in *Schneiderman*; Ex. 133 here); (7) The Theory and Practice of Leninism, by J. Stalin (Ex. 11 in *Schneiderman*, appears to be substantially identical with "Foundations of Leninism", Exs. 1, 36 and 63 here); (8) Why Communism? by M. Olgin (Ex. 18 in *Schneiderman;* Ex. 62 here. After its admission here, it was ordered stricken by the trial judge). There were additional documents of a similar nature introduced in *Schneiderman* as there were here, but the aforementioned writings made up the core of respondent's evidence in each case. Respondent relied principally upon the same excerpts from the documents in evidence here as in *Schneiderman*, although again there were some excerpts added in *Schneiderman* and others assiduously added here.

The principles of the Communist Party condemning resort to force and violence enunciated in its written constitution were the same here as in *Schneiderman* (320 U.S. 118, 157, note 52):

> "Section 2. Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their

destinies in any degree, shall be punished by immediate expulsion."

(1945 Const. Ex. 21, R. 5117.)

* * *

"Section 3. Any member shall be expelled from the Party who is found to be a strikebreaker, provocateur, engaged in espionage, or who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies."

* * *

"Section 9. Members are obligated to fight with all their strength against any and every effort, whether it comes from abroad or within our country, to destroy the rights of labor and the people, or to impose upon the United States the arbitrary will of any group or party or clique or conspiracy, thereby violating the unqualified right of the majority of the people to direct the destinies of our country."

(Added, 1948 convention. Ex. 153, R. 2089.)

It was apparently conceded in the trial below that the Party "ostensibly eschews resort to force and violence as an element of Party tactics" (320 U.S. at 157), for respondent itself introduced into evidence the 1938, 1945 and 1948 constitutions (Ex. 27, R. 571; Ex. 21, R. 1518; Ex. 153, R. 2089). Moreover, as in *Schneiderman*, there was undisputed evidence here that the Party has always publicly disclaimed that the use of force and violence was any part of the program or policy of the Party. In

1936, according to the record here, the Party stated: "The Communist Party declares that it does NOT advocate or condone the use of force and violence; on the contrary this is the method used by the enemies of labor, by provocateurs sent into the workers' ranks, by strike-breakers and vigilantes" (R. 1161). A pamphlet issued in 1947 denied that the Party's aim is the "violent overthrow of the American system", and set forth provisions of the constitution (quoted aforesaid) as the true statement of the Party's position (Ex. FG, R. 5121-25). Petitioner Yates appeared on behalf of the Party before a California legislative committee in 1949, and submitted a written statement which read: "The Communist Party denies the false assumption that it advocates force and violence, which is specifically prohibited in its Constitution" (Ex. KI, R. 10623). The study outlines used in the Party on the fundamentals of Marxism, reiterated the quotation from Lenin as contained in *Schneiderman*: "In order to obtain the power of state, the class conscious workers must win the majority to their side. . . . We are not Blanquists, we are not in favor of the seizure of power by a minority" (Ex. 626, R. 1435). Another outline stated: "Attitude of American Communist Party on force and violence defined in Constitution—advocates of force, violence or terrorism barred from membership" (Ex. 163, R. 3545). All of the aforesaid documents were introduced into evidence by respondent.

So far as petitioner's membership and the holding of office in the Party was concerned, respondent relied below upon petitioner's affiliations with the Party and predecessor organizations from 1922 to 1951, the time of the

indictment. Before the Court of Appeals respondent, in detailing the offices held by petitioner, stated (Resp. Br. p. 11): "Schneiderman testified in his 1939 evocation of citizenship that 'I was a delegate to the National Committee in 1934; and have been a member of the National Committee ever since' (Ex. MM-1, p. 96)." In its brief, respondent pointed to petitioner's testimony in *Schneiderman* to list the positions held by petitioner (See 320 U.S. 118, 126-7), and concluded: "From 1935 until the time of the trial Schneiderman under various titles continued as leader of District 13, C.P.U.S.A., or of the California District of the Party (Exs. 574, 572, 571, 566, 576, 562, 561, 569, 564, 623, 575, 538; A. 446-459),[6] being State Chairman of the Communist Party in California at the time he represented himself before the trial Court (R. 301)" (Resp. Br. id., pp. iii-iv). With respect to officership and membership in the Party, therefore, the evidence here and in *Schneiderman* was virtually the same, and indeed was introduced into this record as an integrated category of proof. The reason for this merger may be explained by the nature of the charge contained in this indictment and respondent's theory below. There was no proof that a conspiracy was formed as alleged on or about June 28, 1940, to commit the offenses alleged in the indictment; respondent's theory appeared to be that the "conspiracy" was formed when the Party was initially organized in the early 1900's and that petitioner wilfully and knowingly joined the alleged conspiracy when he joined the Communist Party at that time, knowing that the Party advocated and taught the doctrines of

[6]The letter "A" refers to the appendix to appellee's brief.

Marxism-Leninism. Thus, the same alleged unlawful knowledge and intent litigated in *Schneiderman* was relitigated here.

2. As in *Schneiderman*, there is nothing in the record here to indicate that petitioner has ever been arrested or subjected to censure, or ever connected with any overt, illegal or violent action or with any disturbance of any sort. As in *Schneiderman*, the record here shows, petitioner continuously denied the charge that petitioner or the Party advocated the forcible overthrow of the Government, or that the "'principles of Marxism-Leninism'' included such unlawful tenet. The evidence in both records on this aspect of petitioner's mental state was the same.

Thus, in 1939 petitioner testified in the Schneiderman proceedings as follows: From 1922 to 1939, in summary, the petitioner's "understanding and interpretation of the program, principles and practice of the Communist Party ever since I joined the Party were and are essentially the same as those enunciated in the present constitution of the Party'' (Exs. MM-1, MM-2, App. Item 99, p. 370). The petitioner stated that he had never considered binding upon him as a member and official of the Party "any doctrines which are in conflict with the principles enunciated in the Constitution of the Party" (id., p. 370). He stated that the Party had frequently been accused of advocating the forcible overthrow of the Government on the basis of quotations from "writings of a whole school of thought known as Marxism, Leninism, or Marxism-Leninism'' (id., p. 371). Petitioner stated that this was a misinterpretation and distortion of the position of the

Party and its members because the quotations were taken out of context, literally and historically; without regard "to the country or countries about which it was written"; without regard to the fact "that such writings or quotations are generally theoretical conclusions about general world affairs"; and that individual interpretations of an author or writer "may be and are at times in conflict with the principles and generally accepted practice of the Communist Party and its members, and these writings may distort the true position of the Party" (id, p. 371).

Moreover, stated petitioner, the application of the tenets of Marxism-Leninism must necessarily vary in each country in accordance with the specific national characteristics of that country and its own peculiar historical traditions and development. "Revolution cannot be imported to one country from another. Neither can it be imposed on any people or any country by the arbitrary will or advocacy or incitement of any group or party. The transformation of society from one stage to another has taken place in different ways in different countries within the general laws defining historical development. Its reorganization on a socialist basis will likewise have different characteristics, forms and methods within these general laws in each country in accordance with its own special characteristics. Any attempt to draw a mechanical comparison between America and other countries would be contrary to our whole method of Marxist-Leninist analysis" (id., pp. 372-3).

Petitioner stated that "the Communists do not desire the use of force and violence. We desire and strive for peaceful and democratic means of removing exploitation

and oppression" (Ex. MM-1, p. 373, R. 11926). Petitioner added that a study of history shows, however, that "no ruling class or dominant group has ever given up its privileges or its power without resistance by legal or illegal means, and by the use of force and violence against the majority even when that majority has come into power by peaceful and constitutional means" (id). Marxists do not say or believe or advocate, nevertheless, that "a social revolution could be brought about by any single group or party by a conspiracy or by in any way imposing the arbitrary will of any minority group or party upon a people or government" (App. Item 99, p. 373). The aim of the Party, stated petitioner, is to educate the people to an understanding of the nature of capitalist society and the experiences of history in all social, political and class struggles in order that the people may better understand how to defend their own interests, and on the basis of such learning and from their own experiences, to win the majority of the people to the principles of socialism (Ex. MM-1, p. 380, R. 11930). The petitioner, and the Party, desired and hoped that socialism could be achieved through peaceable and constitutional means (App. Item 99, p. 373). See also *Schneiderman v. United States*, 320 U.S. 118, 126-8.

From all of the aforesaid, it may be stated generally that in *Schneiderman*, petitioner affirmatively avowed that from 1922 to 1939 his own knowledge, understanding and intent were entirely lawful; that the term "revolution" meant to petitioner only a fundamental change in the class control of society and did not necessarily involve force and violence; that the Party desired to achieve

its program and policies by peaceful and democratic means; and that only as a theoretical matter based upon historical experiences in the past could it be predicted that force and violence might be used by those in power to thwart the majority will, or used by the majority after peaceful and constitutional accession to power to prevent a forcible counter-overthrow.

As the record here indicates, petitioner reaffirmed the same knowledge, understanding and intent in 1943 (R. 11726-33). In 1943, shortly after the argument before this Court in *Schneiderman*, petitioner suggested to petitioner Yates that she examine his testimony of 1939, that the testimony represented petitioner's "views on Marxism-Leninism" (R. 11729). Shortly after the decision of this Court in the same year, petitioner stated to petitioner Yates that "the majority opinion in the Supreme Court reflected fundamentally" the views which petitioner held with respect to the main teachings of Marxism-Leninism, "particularly on such questions as the possibilities for the working class peacefully to secure state power, the character and content of the dictatorship of the proletariat, and on the question of the position of the Communist Party" as expressed by petitioner "on force and violence" (R. 11732). Petitioner stated that he believed "the majority opinion did reflect and did state an accurate interpretation", as he understood it, "on those particular questions of Marxism-Leninism, including the question of force and violence" (R. 11732).

Again in 1951, after the case here had been initiated, petitioner suggested to petitioner Yates that she re-examine his testimony of 1939, that petitioner "believed

that the main issues were essentially the same as the issues in that case, and that the books and the material that was dealt with in the Schneiderman case was essentially the same as the books and material that was to be introduced in this case by the government" (R. 11733).

3. The "additional" testimony which respondent offered here came principally from the alleged recollections of paid F.B.I. informants and former members of the Party avowedly hostile to the Party and its membership. Petitioner held office in the Party in California according to the record for a period of about 20 years, during which period he was the focus of assiduous attention by governmental agents and informants. During this long period of carefully scrutinized activity by petitioner, there is no evidence in this record that he ever used a Marxist book unlawfully, or interpreted any excerpt in a Marxist book unlawfully, or otherwise. There is no evidence that petitioner ever expressly advocated the forcible overthrow of the Government, publicly or within the organization, and, as has been noted, there is no evidence that petitioner was ever connected with any overt illegal or violent action or with any disturbance of any sort. What evidence there is consists of some diverse incidents involving no more than the use of some equivocal language filtered through the deluding memory of some hostile and interested witness, which falls far short of clear, convincing and unequivocal proof that petitioner has at any time since *Schneiderman*, and contrary to his repeatedly expressed views in 1927, 1939, 1943 and 1951, adopted some reprehensible interpretation of the principles of Marxism-Leninism and the programs and policies of the Party.

For the convenience of this Court and for a proper evaluation of such evidence, petitioner has divided discussion of the evidence in choronological subdivisions. The first period, and perhaps the most crucial, is that period within the statute of limitations here, December 21, 1948, to December 21, 1951. The evidence indicated that petitioner was chairman of the Communist Party of California (R. 11229). He attended state and (San Francisco) county board meetings of the Party in 1948 and 1949 (R. 5446). In May, 1949, he delivered a talk "on behalf of the leaders of the Communist Party who were indicted in New York" (R. 1338, 1344). He may also have discussed peace, and may possibly have referred to the opinion of this Court in *Schneiderman*, perhaps stating that the Party did not advocate the forcible overthrow of the Government (R. 1688-90). In January, 1950, he attended and spoke at a Lenin Memorial meeting in Los Angeles, although what he said is not disclosed in the record (R. 8061-3). In January, 1951, he attended the East Bay Regional Convention of the Party, was introduced as the state chairman, and spoke (R. 3571). What he talked about is not revealed in the record. As was noted, it was in 1951 that petitioner again referred to his testimony in *Schneiderman* and stated his belief that the issues here were the same (R. 11733). That is all the so-called additional evidence in this record concerning petitioner's activities during the period covered by the statute of limitations, from December 21, 1948, to December 21, 1951.

The next period may appropriately be taken as covering the period outside the statute of limitations, begin-

ning with the reconstitution of the Communist Party, July 28, 1945, until December 21, 1948. The petitioner attended the national conventions of the Party in 1945 and 1948 (R. 2034), but there was no evidence as to what he said or did (R. 2034). At a second session of the 1945 state convention in California he "was barely re-elected State Organizer" (R. 455). He was in attendance at state conventions in August, 1945, both in Los Angeles and San Francisco (R. 4168). At San Francisco he said "we were going to carry on" the development of the Communist Party, and restore its theoretical foundations and axioms (R. 622). That petitioner continued to believe after the reconstitution of the Party, as he had previously reiterated in 1939 and 1943, that a social revolution was impossible without support of the majority will of the people, that it was a vulgarization of Marxist-Leninist doctrines to believe that social changes could be imposed arbitrarily by any minority group or party upon a people or a government, and that a proper historical and contextual study of Marxist-Leninist writings was essential to avoid all such distortions and misinterpretations was clear from the evidence adduced by respondent itself.

It was one of respondent's witnesses who testified that he left the Party because of his disagreement with petitioner; the witness insisted that petitioner's view of Marxism was at odds with the witness's view which latter view was "stand-up militantly as Communists until we got what we stood for and let the chips fall where they may on that" (R. 1079-80). The same witness for respondent testified the witness and the petitioner were in disagreement at the August, 1945, state

convention, each occupying a respective side of the convention which was "split down the middle". The segment of persons who sided with respondent's witness, as contrasted with the segment who sided with petitioner, felt that somebody was trying to control the Party, "sell us out in the interests of the foreign policy of the Soviet Union" by watering down the Party line, double talk, endless talk of united front. The witness's segment generally accused the petitioner's segment of watering down the version of Marx so it did not stand for the overthrow of the Government (R. 975-6).

Against these "leftists," petitioner appears to have carried on an unremitting struggle. In 1946, petitioner stated that the Party was "being reconstituted toward a purely Marxist-Leninist line," and was embarking on a purely Marxist role, "the playing of a revolutionary role in society" (R. 4375). Petitioner said then that the American people should avoid going through the experience of fascism that the German people had; that one reason for the rise of fascism in Germany was the failure to carry out a united front policy (R. 4669-71). In May or June, 1946, petitioner was present at a meeting where, following the presentation of charges and considerable debate, a group of "leftists" were expelled from the Party. The charges included opposition to the Party and petitioner as chairman of the Party in California upon the following grounds: the persons expelled were opposed to a program of coalition with progressive forces; they opposed a Party program for peace; they did not agree that a campaign for fair employment practices legislation was important; they were opposed to participation by the Party in election campaigns;

contrary to the views of the Party and those of petitioner and other officers, the "leftists" favored the extension of a machinists' strike to the waterfront, favored a general strike, and supported the view that strikes, whether won or lost, are always a gain for the working class, and opposed a settlement of the strike as the Party and petitioner urged; the "leftists" took the position that the immediate overthrow of the capitalistic system, without regard to first winning a majority to socialism, was the issue then facing the American people (R. 4456, 4674-4708). By an overwhelming vote, these "leftists" were expelled for their anti-Party activity (R. 4391).

Another of respondent's witnesses, a paid F.B.I. informant, testified that he was present in 1947 at a meeting at which petitioner allegedly spoke on left sectarianism and right deviations. The witness testified that while a member of the Party, he had previously been taught that a transition from capitalism to socialism would be "a drastic change," hence a revolution (R. 4913). The witness assertedly learned that part of the changing process would be violent because the minority would not permit the majority to effect such a change peacefully (R. 4912-13), that when the majority of the American people would exercise their free choice to establish socialism, the minority would not be willing to accept the wishes of the majority (R. 4902-03). It was this witness who allegedly recalled petitioner's remarks made in the meeting of 1947 on left-sectarianism.

Petitioner allegedly stated at the 1947 meeting, according to the witness, that the Party was still on the Marxist-Leninist line; that the expelled left sectarians were

like the horse that is too far ahead of the cart, that they were impatient, that they wanted the Party to embark on adventurous campaigns, that they criticized the Party for not being revolutionary. He assured the members that "we were", that before the revolution can be thought of the Party must first build a mass base among labor, farmers and minority groups, that revolution is a serious business and not something to shrug or laugh off, that it means tragedy and bloodshed and doubted if many Party members were ready for revolution; that it meant sacrifices, loss of property, loss of person, of life, but that these were expendable to achieve the goal of socialism; "but the Party was just not prepared for revolution and the majority of the members of the Party weren't conscious of the seriousness of it" (R. 4378-9). According to the extended recollection of the witness, petitioner expressed the opinion that the ultimate goal of socialism could only be accomplished through violence, that "the masters of finance capital would never give in without a fight" (R. 4380).

The same witness testified that petitioner criticized Browder for tying the Party to "the coat of the bourgeoisie", that Browder had anesthesized the revolutionary potential of the Party (R. 4381). However, another witness testified that there was a big discussion about removing petitioner from the Party because "he was a Browderite or something" (R. 6112).

Another of respondent's witnesses described a talk petitioner allegedly made at the Embassy Auditorium in Los Angeles in November, 1946, on U. S. foreign policy (R. 3885). Petitioner there stated that the United States

had better consider Communist successes in Yugoslavia, Czechoslovakia, China, Burma, France and the socialist gains in Britain, and think twice about what allies or aid it might get in case of war with the Soviet Union. He urged stopping aid to Chiang Kai-shek, demobilization of U.S. armed forces, removal of U.S. labels from relief goods, and adoption of Marxist training. It is alleged that he said free elections in this country can only serve the purposes of the fascists (R. 3889). In a long record liberally sprinkled with instances of participation in election campaigns by petitioner and others in the Party (R. 961-2, 1348, 1629-93, 5528-29; Exs. 579, 554, 542, 631, 632, 633, 634, 635, 519, 578; R. 4556-58, 4562-64, 4576-80; see also *Communist Party v. Peek*, 20 C. 2d 536, 127 P. 2d 889, 1942), this is the sole instance of anyone purportedly saying anything against the election process. Indeed, the same witness testified th. , although the Communist Party never supported a fascist for public office, it did support Franklin Roosevelt and Helen Gahagan Douglas (R. 4152-3), Sheridan Downey (R. 4161), Harry S. Truman (R. 4159) and other candidates on issues.

We have thus covered the evidence in the record involving the petitioner under the issues here in a period of over six years preceding the return of the indictment. The next period is the remainder of the time covered by the indictment, the period from the enactment of the Smith Act on June 28, 1940, to the reconstitution of the Party on July 28, 1945. In June, 1945, petitioner allegedly took part in a heated discussion at a meeting of the Seamen's Branch of the Party about Ex. 671, a discussion bulletin. He said allegedly "that we are

not giving up the revolution and dictatorship of the proletariat, we were going back to the fundamentals of Marxism-Leninism and Stalinism" (R. 611-12). At the San Francisco state convention in June, 1945, petitioner said so many comrades had got rid of their theoretical books, that "we were going back" to these and had to build libraries of Marxism-Leninism and Stalinism (R. 617-18). At the Los Angeles convention petitioner said he was sorry for his revisionist attitude and was willing to lead on to a more militant party (R. 3860). A speaker at that convention who arose to urge a revolution of the workers and the overthrow of the Government (R. 3858) was thereafter expelled from the Party for "left sectarianism" (R. 4273). At the San Francisco convention petitioner was elected delegate to the National Convention. Nominating him, one Nelson described two groups in the Party, one of which was composed of those who held jobs and devoted part time to Party activities, and the other of which consisted of those who gave their whole lives to building and developing the Party, what Lenin called professional revolutionists, "and we had people like Schneiderman" (R. 620).

In June, 1943, petitioner attended a conference in San Francisco originally called to select a successor for petitioner, who anticipated being drafted into the army. The conference followed by a few days the decision of this Court in *Schneiderman*. Petitioner described the decision as an important victory for citizenship rights and civil rights generally, said that it confirmed many of the teachings of the Party and positions which the Party had taken and said he believed the decision upheld his

own views of the teachings, activities and theories of the Party which he had given in the course of his own testimony in that proceeding (R. 10957-61). In July, 1943, petitioner spoke in Los Angeles together with William Z. Foster (R. 5590). An article on the 50th birthday of Earl Browder in a magazine "The Communist" for July, 1941 (Ex. 14), lists petitioner as its author (R. 5576). In October, 1940, petitioner had a conversation with a respondent's witness in which he allegedly said that the enactment of the Voorhees Act would not interfere with the Party continuing to aid workers in other countries (R. 679).

The aforesaid embraces the eleven-year period covered in the indictment. If evidence prior thereto is to be considered at all, the evidence here with respect to the period prior to the passage of the Smith Act emanated principally from one respondent's witness, Nat Honig, a notorious and peripatetic paid informant.[7]

Respondent's witness as aforesaid testified that petitioner was in Moscow from June, 1934, to September, 1935, as a representative from the American Communist Party to the Communist International (R. 7693-99), that at one meeting in mid-June, 1934, the chairman of the meeting said he had a report from the Communist Party

[7]The witness had testified in different Communist cases (R. 8116-7) in recent years. It was shown that he tailored his testimony in each case to fit the immediate purpose. Unwilling to admit serious discrepancies between his testimony in different proceedings, he sought to attribute the differences to errors in reporting. But these alleged errors were conclusively demonstrated to be nothing of the kind when the actual recordings of his prior testimony were played by soundscriber to the court and jury (Cf., R. 10771 with R. 8371, and R. 10776-7 with R. 8413).

that the situation on the San Francisco waterfront furnished the opportunity for a general strike; that petitioner agreed with the chairman's estimate that a general strike could be produced and that such a general strike would be an excellent rehearsal for seizure of power by the American Party. Petitioner allegedly agreed that instructions to bring about such a general strike should go to the American Party (R. 7706, 7718).

Actually, as the witness conceded on this record, the general strike of 1934 in San Francisco was under the direction of a special committee of the San Francisco Labor Council, A.F.L. Some of the committee members, none of them Communists, were: Edgar (sic) Vandeleur, George Kidwell, John O'Connell, Milton Maxwell and Charles Barry, Editor of the Labor Clarion, a newspaper (R. 8253-57). The longshoremen's strike in 1934 was exclusively concerned with improvements sought in the wages, hours and working conditions of the workers: union recognition, union control of hiring hall, a 6-hour day, a 30-hour week, $1.00 an hour straight time, $1.50 an hour for overtime, and fair working rules (R. 8237-38). In the very same period, a resolution adopted by the central committee of the Party, September 5-6, 1934 (Ex. 738), stated: "It was the capitalist class which, in panic before the rising giant of class action of the workers, hysterically cried out that this strike, which they could have settled very quickly at any time by the simple expedient of granting the workers' demands, was actually a revolutionary uprising organized by the Communist Party to overthrow the whole capitalist system. Of course, this strike did not have revolution as its objec-

tive, but only the immediate demands of the workers" (R. 8629).

Honig, the same witness, added that in 1936, he attended meetings in San Francisco where waterfront labor difficulties were discussed and that petitioner suggested that maybe the same situation as in 1934, a general strike could be brought about, reminding those present that as was said in the Comintern in 1934, such general strikes are rehearsals for seizure of power by the Party and the working class (R. 7725, 7730). But as the uncontradicted record showed, petitioner in a radio speech in September, 1936, as reported in the newspaper, Western Worker (Ex. 1, R. 8294), as a "part of the California program of the Communist Party in the 1936 election campaign," said of the waterfront labor difficulty: "The Communist Party declares that it does *not* advocate or condone the use of force and violence; on the contrary this is the method used by the enemies of labor, by provocateurs sent into the workers' ranks, by strikebreakers and vigilantes. The Communist Party is not interested in strikes for their own sake. We know full well how costly strikes are for the workers, and their families. In the present waterfront situation, we hope, as do all friends of labor, that the threat of a strike or lockout will be averted through negotiations and a peaceful settlement, which will take into consideration the just demands of the maritime unions" (R. 8161). The maritime unions sought repeatedly to avoid a strike (Ex. 1B, R. 8285), an attitude confirmed by a report of the Department of Labor on the maritime strike of 1936-7 (Ex. 1C, R. 8292). The same report emphasized that the strike was marked

by public debate in the press and radio, with the strikers cooperating "with the regular city policy to maintain order" (R. 8311). Honig himself was the managing editor of the Western Worker in 1936, allegedly Communist controlled, when editorials were noting that "the unions have done everything possible to settle the issue through peaceful negotiations, but the employers are forcing the struggle upon them" (R. 8295-6, 8302-4, Exs. ID, IE).

Honig also testified that in 1936, the then editor of the Western Worker, one Carlisle, was the subject of discussion at a meeting at which petitioner allegedly stated that Carlisle was being removed from his job because of his dilettante attitude, that this attitude was inconsistent with the ultimate aim of the Party which was to bring about a revolution in the United States and seizure of power by the Party. Petitioner allegedly said that "petty bourgeois elements on the staff" of the Western Worker should not forget that the united front against fascism was just a temporary tactic and that "we still had the ultimate aim of overthrow of the American bourgeois government" (R. 7732). Honig had testified prior hereto against Carlisle in a deportation proceeding, based on Carlisle's alleged membership in organization advocating the forcible overthrow of the government. Honig testified about the same event in 1936 concerning Carlisle's removal as editor, but he said nothing about Carlisle's dilettante attitude nor a program for seizure of power (R. 8386-93).

Honig in his testimony gave his own understanding and beliefs while a member of the Party on the question of accession to power of a socialist government. He

thought during his membership that there was a 75% or greater chance that when the American people reach the point of doing away with capitalism as a system, they could then be in such a great majority and indicate it so plainly that there would be no need for any kind of struggle or violence (R. 8544-49). Many Party leaders had told him this would be true (R. 8549). These beliefs represented what the witness desired, wished and hoped for, and what the same Party leaders preferred (R. 8544).

The remainder of this pre-Smith Act testimony was as follows: Petitioner gave some lectures at a 1937 State School of the Party (R. 463, 1011). Honig stated that petitioner gave some lectures at the Lenin Institute while in Moscow (R. 7719). There was no evidence as to the contents of these lectures. Petitioner in 1937, together with others, allegedly established the State school, approving generally the proposed outline for such a school and its financing (R. 480). In 1936, petitioner allegedly attended "underground" meetings in Los Angeles with several of his co-defendants, although the record does not show what took place at such meetings (R. 5976). Exhibits in evidence reflect judgments obtained from 1931 to 1933 in Los Angeles federal district, Superior and Municipal Courts, in actions for damages or injunctions against certain public officials, for unlawfully interfering with and breaking up political meetings held by Communists and others (Exs. FX (R. 5922); FY (R. 5955); FZ (R. 5955); GA (R. 5923); GB (R. 5958); and GC (R. 5922)). In 1937, petitioner criticized a "Trotskyite" article in the Western Worker (R. 447). In 1939 he stopped with a

Negro prosecution witness at a place where they were refused service; he allegedly told the witness he had no time to stop and file a suit and fight for Negro rights, that he had other things to do (R. 6018). In December, 1939, petitioner testified before the District Court in *Schneiderman.*

ARGUMENT.

The argument reasons relied on for allowing the Writ are in part the same as those recited in the Yates petition and they are not repeated here.

I

THE COURTS BELOW ERRED IN EXCLUDING THE QUESTIONS OF RES JUDICATA AND COLLATERAL ESTOPPEL FROM THE CASE MADE AGAINST PETITIONER AND IN PERMITTING RESPONDENT TO RELITIGATE FACTUAL DETERMINATIONS PREVIOUSLY AND FINALLY DECIDED ADVERSELY TO RESPONDENT IN THE LITIGATION BETWEEN RESPONDENT AND PETITIONER IN SCHNEIDERMAN. THERE WAS NO DIFFERENT AND ADDITIONAL TESTIMONY IN THIS RECORD SUFFICIENT TO SUSTAIN THE CONVICTION HERE OR TO AVOID THE CONCLUSIVE EFFECT OF THE JUDGMENT IN SCHNEIDERMAN.

1. This Court has stated that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for relief or non-relief, cannot be disputed in subsequent litigation between the same parties; "and even if the second suit is for a different cause of action, the right, question or facts once so determined must, as between the same par-

ties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48-9. See, also, *Frank v. Mangum*, 237 U.S. 309; *United States v. Oppenheimer*, 242 U.S. 85; *Sealfon v. United States*, 332 U.S. 575; *United States v. Williams*, 341 U.S. 58; *Steele v. United States*, 267 U.S. 498, 505; *United States v. Adams*, 281 U.S. 202.

The scope of res judicata and collateral estoppel have been heretofore considered by this Court, and it has been held that the Government may not relitigate an issue heretofore litigated no matter in how many different forms it casts its cause of action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-8. A determination in a criminal proceeding has been held to be a bar in a civil proceeding (*Coffey v. United States*, 116 U.S. 436); a determination in an admiralty proceeding a bar to a civil action (*Gelston v. Hoyt*, 3 Wheat. (U.S.) 246); a determination in an injunction suit a bar to an action for damages (*United States v. Munsingwear*, 340 U.S. 36). The same principles have been applied to the decisions of administrative tribunals. *L. & N. Ry. Co. v. Ohio Valley Tie. Co.*, 242 U.S. 288. The question in each case is, therefore, what issues have been determined, not what was the form of the action in which they were determined. *New Orleans v. Citizens Bank*, 167 U.S. 371 (1897). Especially is this true where, as here, the prior litigation sought consequences "more serious than a taking of one's property, or the imposition of a fine or other penalty" (*Schneiderman v. United States*, 320 U.S. 118, 122; Cf., *Coffey v. United States*, 116 U.S. 436 supra),

and where the standard of proof in such prior litigation was "substantially identical with that required in criminal cases—proof beyond a reasonable doubt" (*Klapprott v. United States*, 335 U.S. 601, 612). In the Court of Appeals here, it was held that there is no precedent to support the view that "a prior judgment in a cancellation of citizenship case estops the government or that the findings therein are res adjudicata against the government in a subsequent criminal case" (Appendix A, p. 22). In so deciding, the Court below decided the case contrary to applicable decisions of this Court as aforesaid.

2. In *Schneiderman*, the proceeding was commenced by the filing of a complaint in the District Court against the petitioner in which respondent sought petitioner's denaturalization pursuant to the applicable statutes upon the grounds that petitioner had procured the naturalization illegally and by fraud. The complaint charged (Par. IV, App. Item 100, p. 375) that petitioner "at the time of his naturalization" and "during the period of five years immediately preceding" was a member of and affiliated with and believed in the principles of the "Workers (Communist) Party of America," whose principles "advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence." The complaint also charged (Par. V, App. Item 100, p. 376), "that at all times subsequent to the entry of said decree of naturalization," petitioner "continued to be, and now is, a member" of the named organizations with the same proscribed principles "and during all of said times respondent has continued to believe in and support said principles of said organizations."

To these allegations, petitioner made answer admitting the fact of his membership but denying that the Communist Party had any such principles as were alleged. Petitioner also filed a separate defense in which he specifically denied that the Party ever taught and advocated the overthrow of the Government of the United States by force and violence; in which he affirmatively alleged that the Party taught and advocated the defense of the democratic liberties of the American people and the defense of the United States Constitution; and petitioner affirmatively set forth the constitution of the Party to demonstrate its opposition to the use of force and violence (App. Item 101, p. 379).

At the trial in 1939, counsel for respondent stated that "we expect to show" that "prior to the filing of the declaration of intention by Mr. Schneiderman for citizenship and at the time of the filing of the declaration of intention and at the time of the filing of his petition for citizenship and at the time of his admission to the citizenship and up to the present time," petitioner advocated the proscribed doctrines and was a member of organizations with such unlawful tenets, and that petitioner believed in such doctrines (App. Item 102, p. 384). Voluminous testimony was then introduced on both sides, practically every bit of it going to the issues relating to the principles of Marxism-Leninism and their interpretation on the question of force and violence, the teaching and advocacy of such principles by the Communist Party, and the knowledge and intent of petitioner with relation thereto. We have recounted some of the documentary and oral evidence in the Statement of the Case here. See,

Transcript of Record, *Schneiderman v. United States*, this Court No. 2, Oct. Term 1942; Exs. MM-1, MM-2 in the instant case.

The written decision of the District Court (33 F. Supp. 512), in granting the petition and entering a decree revoking petitioner's citizenship, noted that "the government has placed in evidence many volumes of books and pamphlets which explain the doctrines of Marx, Engels, Lenin and Stalin, upon which the principles and practices of the Communist Party and its predecessor organizations are based"; that the government had "also called upon three witnesses, including defendant, to explain the position of the Communist Party and these predecessor organizations with respect to communist ends and means"; that "the court may note defendant's conduct, as outlined above, in order to throw light on his state of mind during the probationary period," and that "the conclusion which this court reaches" is that the organizations of which petitioner was a member sought to establish the "dictatorship of the proletariat" and that "methods of force and violence" are accepted and necessary for such attainment, and that the organizations to which petitioner belonged "taught and advocated the overthrow of the government by force and violence." In accordance with the views expressed in the aforesaid decision and respondent's theory of the case, the District Court made and entered findings of fact, specifically finding that petitioner "was a member of and affiliated with and believed in the principles of * * * the Communist Party of the United States of America * * * which organizations * * * advised, advocated and taught the overthrow of the

Government * * * of the United States by force and violence * * *"; that the petitioner "intended to adhere to and support and defend and advocate the principles and teachings * * * which * * * advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence" (App. Item 103, pp. 385-87).

On appeal to the Court of Appeals in *Schneiderman*, petitioner challenged the sufficiency of the evidence to support the findings of the District Court, alleging among other things, that the evidence did not establish "that either Respondent, or any organization with which he was associated, or of which he was a member, believed in the overthrow of the government by force or violence, or advocated or taught such principles" (App. Item 104, p. 388). The Appellate Court, observing that the issues were in sharp conflict, affirmed the judgment upon the ground that the findings "are not clearly erroneous." 119 F. 2d 500 (C.A. 9, 1941).

This Court in *Schneiderman* noted that one of the two fundamental contentions made by respondent was that petitioner "believed in and advocated the overthrow by force and violence of the Government, Constitution and laws of the United States." 320 U.S. 118, 135. "The Government contends that petitioner was not attached because he believed in the use of force and violence instead of peaceful democratic methods to achieve his desires . . . the Government admits the presence of sharply conflicting views on the issue of force and violence as a Party principle, and it also concedes that 'some communist literature in respect of force and violence is suspectible

of an interpretation more rhetorical than literal'. It insists, however, that excerpts from the documents on which it particularly relies, are enough to show that the trial court's finding that the Communist Party advocated violent overthrow of the Government was not 'clearly erroneous'." 320 U.S. 118, 146, 148.

Upon review of the Marxist-Leninist literature introduced into the record, the constitution of the Party, the testimony of the witnesses for respondent and the testimony of petitioner and his witnesses, this Court found that "a tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open." 320 U.S. 118, 157. The Court held further that the respondent had not carried its burden of proving the unlawful knowledge and intent of petitioner. "We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation.

So uncertain a chain of proof does not add up to the requisite 'clear, unequivocal, and convincing' evidence for setting aside a naturalization decree." 320 U.S. 118, 158.

As has been indicated, following the reversal of the judgment in *Schneiderman* by this Court, mandates issued from this Court and the Court of Appeals which were finally spread on the minutes of the District Court. On August 30, 1943, the naturalization certificate previously surrendered by order of the Court was returned to petitioner. The issues were therefore finally adjudicated by this Court and so accepted by respondent. The principles of res judicata and collateral estoppel became applicable thereafter. *Duncan v. Gegan*, 101 U.S. 810; *Southern Pac. R. Co. v. United States*, 168 U.S. 1; *Kannel v. Kennedy*, 94 F. 2d 487 (C.A. 3, 1937); *Sewerage Comm. of City of Milwaukee v. Activated Sludge*, 81 F. 2d 22 (C.A. 7, 1936); *Larkin Automotive Parts Co. v. Bassick Mfg. Co.*, 19 F. 2d 944 (C.A. 7, 1927).

In the instant case, the form of the action was "conspiracy." The issues drawn by the indictment and plea of the petitioner were, however, in essential aspects identical. The objects of the conspiracy were "advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence," and "organizing, and helping to organize, as the Communist Party of the United of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." It was alleged that it was "a part of said conspiracy" that petitioner and the others would teach and advocate "the principles of Marxism-

Leninism" equated with the duty and necessity of forcibly overthrowing the Government. It was alleged that petitioner wilfully and knowingly conspired to commit the aforesaid offenses. The issue thus drawn required proof that petitioner knew and intended to advocate and teach the forcible overthrow of the Government and knew and intended to use the Party as a vehicle for such advocacy and teaching. In addition, the indictment charged a specific intent to forcibly overthrow the Government as speedily as circumstances would permit.

The evidence introduced by respondent in support of the indictment followed closely the lines of proof adopted in *Schneiderman.* Again, as has been noted, the same basic Marxist-Leninst documents were introduced into evidence, and the same and similar excerpts read therefrom into the record. Again, the membership and officership of the petitioner in the Party from the inception thereof was put into evidence. Again proof was introduced that the Party has continuously from its organization in the early 1900's advocated and taught the principles of Marxism-Leninism. The jury were so instructed as to permit a verdict of guilt to be returned against petitioner on the following theory adopted by both respondent and the trial judge and approved by the Court of Appeals (See R. 9987-88; App. Item 4, pp. 82-83; 106 F. Supp. 906, 921-923; summations of respondent, R. 12592 et seq.): The jury could find that there is only one interpretation of the principles of Marxism-Leninism, to-wit, advocacy and teaching of the overthrow of the Government of the United States by force and violence, such advocacy and teaching having been continuously in

existence since at least the publication of the Communist Manifesto in 1848 written by Marx and Engels and the later writings since the beginning of the nineteenth century of Lenin and Stalin. The Communist Party, since its inception in 1919, has advocated and taught the principles of Marxism-Leninism; the Party has therefore always advocated and taught the forcible overthrow of the Government. The petitioner joined the Party on or about 1922 knowing that the Party advocated and taught the principles of Marxism-Leninism and remained a member continuously thereafter occupying leading positions in the Party and participating in its activities; the jury could therefore infer that petitioner knew and intended from the beginning of his membership in the Party to advocate and teach the forcible overthrow of the Government and to actually overthrow the Government by force as speedily as circumstances permit, and that with such knowledge and intent petitioner joined the conspiracy alleged in the indictment—a conspiracy which respondent contended at the trial had existed at least from the time of the organization of the Party.

3. On this state of the record, the trial judge, as has been shown, excluded all questions of res judicata and collateral estoppel from the case. The trial judge made no ruling, and gave the jury no instructions, that as between the respondent and petitioner it had been finally determined that a tenable conclusion is that the principles of Marxism-Leninism do not advocate and teach the forcible overthrow of the Government; that the advocacy and teaching of the principles of Marxism-Leninism by the Party are not equivalent to the advocacy and teaching

of the forcible overthrow of the Government; that in the absence of clear, convincing and unequivocal proof of overt acts showing that petitioner had adopted a reprehensible interpretation of the principles of Marxism-Leninism and the programs and policies of the Party, the jury could not infer that petitioner knew that the Party by its advocacy and teaching of such principles taught and advocated the forcible overthrow of the Government or that petitioner so intended to teach and advocate with the intent to forcibly overthrow the Government as soon as circumstances permit.

If it be argued by respondent that the jury could have disregarded all of the aforesaid and convicted petitioner under this indictment solely on the "additional" evidence adduced herein, the answer is two-fold. In the first place, this Court is in no position now, it is respectfully submitted, to determine on what evidence the general verdict of the jury was based. *Stromberg v. California,* 283 U.S. 359, 367-8. The jury could have convicted petitioner on facts inconsistent with the facts as previously adjudicated. See, *Local 167, International Brotherhood of Teamsters v. United States,* 291 U.S. 293; *Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316. Moreover, it is settled that basic factual determinations subject to the doctrines of res judicata and collateral estoppel cannot be litigated again by adding merely some additional proof in support of the same basic issue, or by adding some new elements to the charge, or by merely bringing forward some new witnesses. *Last Chance Mining Co. v. Tyler Mining Co.,* 157 U.S. 683, 691; *City of New Orleans v. Citizens Bank,* 167 U.S. 371, 396; *Sealfon*

v. United States, supra. In the second place, such evidence was palpably insufficient, certainly not "clear, convincing and unequivocal," either to sustain the conviction here or to controvert that petitioner, as in *Schneiderman,* did not intend to advocate and teach the forcible overthrow of the Government or to actually overthrow the Government, and that by his membership and officership in the Party, he did not understand the principles or programs of the Party, or the doctrines of Marxism-Leninism, to include the forcible overthrow of the Government. We do not repeat the discussion of the insufficiency of the evidence and the unlawful standards of proof adopted by the courts below as contained in the Yates petition. See, *De Jonge v. Oregon,* 299 U.S. 353; *Herndon v. Lowry,* 301 U.S. 242; *Schneiderman v. United States,* 320 U.S. 118; *Baumgartner v. United States,* 322 U.S. 665; *Hartzel v. United States,* 322 U.S. 680.

In addition, it must be noted that the respondent relied here upon evidence that preceded the years 1927. It stressed (1) that the principles of Marxism-Leninism were the same from 1848; it stressed that the Party advocated the unlawful doctrines from its inception in 1919; it stressed that petitioner's unlawful knowledge and intent were contemperaneous with his joining the Party on or about 1922. The duty of the trial judge to instruct the jury that these issues, even if considered only evidentiary or intermediate questions, had actually been decided in the prior litigation adverse to respondent, was plain. *United States v. B. & O. R.R. Co.,* 229 U.S. 244; *Sealfon v. United States,* supra. The duty of the trial judge was to instruct the jury that the issue of the

knowledge and intent of petitioner had been adjudicated adverse to the respondent at the very least up to the year 1927; that a lawful intent once established is presumed to continue (*Wolf v. United States,* 259 Fed. 388; 393 (C.A. 8, 1919); *Kammann v. United States,* 259 Fed. 192, 194 (C.A. 7, 1919)); and that the burden rested upon respondent to prove by clear, convincing and unequivocal evidence and beyond a reasonable doubt that the lawful intent previously adjudicated had turned into the specific criminal intent alleged in the indictment. By the exclusion of the entire question of res judicata and collateral estoppel from the case at all stages, the trial judge, sustained by the Court of Appeals, made any consideration of the prior litigation by the Court or the jury entirely impossible.

The question involved herein is one of great importance in the administration of criminal justice in the federal courts. This Court has stated that the principles of res judicata and collateral estoppel are "essential to the maintenance of social order." *So. Pac. Co. v. United States,* 168 U.S. 1, 49. And, in this connection, this Court has also stated: "It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer,* 242 U.S. 85, 87.

CONCLUSION.

The petition for writ of certiorari should be granted, and the judgment of conviction reversed with directions to the District Court to grant petitioner's motion for judgment of acquittal.

Dated, August 8, 1955.

ROBERT W. KENNY,
Attorney for Petitioner.

BENJAMIN DREYFUS,
Of Counsel.

TABLE OF AUTHORITIES CITED

Cases	Page
Partmar Corporation v. Paramount Pictures Theatres Corporation, 349 U. S. 89	3
Schechter v. United States, 295 U. S. 495	2

Statute	
United States Constitution, First Amendment	1

IN THE

Supreme Court of the United States

October Term, 1955.
No. 309

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Reply of Petitioner William Schneiderman to Brief for the United States.

A. Respondent's reply emphasizes the substantial importance of the questions presented. The issues existing here are far different from those which arose in *Dennis,* or in *Frankfeld* and *Flynn* where certiorari was denied. In this case, the courts below, and respondent, propose a new and sharp enlargement of the scope of the Smith Act which seriously intrudes into First Amendment rights. Only review by this Court can prevent the enforcement of the Act from becoming "unconfined and vagrant."

Cardozo, J., in *Schechter v. United States*, 295 U. S. 495, 551.

Thus, in the proceeding here, one of the crucial points is the refusal of the trial judge, sustained by the Court of Appeals, to give any instruction to the effect that the advocacy and teaching prohibited by the Smith Act must be in language of incitement to action. This is the first case presented to this Court where there was a refusal to give such instruction.

In this case, the trial judge refused to make any finding with respect to "clear and present" danger, holding only that seditious intent and clear and present danger were the same. This is the first case presented to this Court where a trial court has refused to make a proper finding of clear and present danger, and where it is contended that such finding can be made by an appellate court based only on the state of international relations to the exclusion of an accused's power to bring about the evil or the nature of his activities.

This is the first case where the sufficiency of the evidence to establish the "overt acts" as charged in the indictment, and the failure to properly instruct with respect thereto, is presented. No other case before this Court in a Smith Act prosecution has presented the question of the application of the "overt acts" provision of the conspiracy statute to the Smith Act under the Constitution.

This is the first case where the proper interpretation of the word "organize" in the Smith Act is presented for this Court's determination. In *Dennis*, the indictment

was returned only a few days before the expiration of the three-year statute of limitations. In *Frankfeld*, the issue was not raised. In *Flynn*, the ruling of District Judge Dimock was precisely contrary to the ruling of the courts below.

The evidence here was different from that in *Dennis* or any other Smith Act prosecution. The record is barren of evidence to establish connection with the conspiracy charged in the indictment or individual specific intent. Whether proof of membership and officership in the Party and lawful activities therein are sufficient to permit the case to go to the jury has never been presented as pointedly as in the case herein.

B. On the issue of *res judicata* and collateral estoppel, respondent's brief (pp. 51-52) makes no attempt to dispute petitioner's statement of the similarities of the issues and the evidence in *Schneiderman* and the case herein (Pet. pp. 4-14, 29-34). Respondent cites only one precedent (and that one is opposed to its position) and makes no attempt to discuss any of the clear precedents which support petitioner's position (Pet. pp. 27-29, 34-39). Petitioner would add the recent decision of this Court in *Partmar Corporation v. Paramount Pictures Theatres Corporation*, 349 U. S. 89. Moreover, respondent has not discussed the prejudice flowing from the trial court's refusal to give any instruction to the jury with respect to the issue here as raised by petitioner during the trial (Pet. pp. 38-39). Respondent's own statement of the facts with respect to petitioner (Resp. Br.

pp. 5-6), and its discussion of the same "principles of Marxism-Leninism" distilled from the same or similar books as in *Schneiderman,* emphasize that the evidence and issues of petitioner's knowledge and intent from 1922 on were the same in *Schneiderman* as in the case herein. Respondent makes no argument that the "additional evidence" (Pet. pp. 14-27, 37-38) deprived petitioner of the right to invoke the principles of collateral estoppel.

There is plainly presented here a substantial question affecting the administration of criminal justice in the federal courts which ought to be reviewed by this Court.

Conclusion.

The petition for writ of certiorari should be granted.

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Attorney for Petitioner.

BENJAMIN DREYFUS,
Of Counsel.

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statutes and constitutional provisions involved	2
Questions presented	2
Statement of the case	3
Introduction	3
Overt acts	7
Petitioner's remarks	8
Petitioner's express disclaimers of prohibited advocacy	16
Summary of argument	22
Argument	24
I.	
The evidence was not clear, convincing and unequivocal, it lacked solidity, and hence was insufficient to establish petitioner's connection with the conspiracy charged in the indictment, and his specific intent to advocate and to bring about the overthrow of the government by force and violence	24
Remote and insubstantial evidence	28
Evidence of criminal intent wholly inadequate	32
II.	
This proceeding is barred, at least as to this petitioner, under the principles of res judicata and collateral estoppel	34
A. The decision in Schneiderman v. United States, 320 U.S. 118, concluded the government with respect to the issues it seeks to litigate here	34
1. The pleadings in Schneiderman demonstrate the identity of the issues	37
2. The trial record in Schneiderman demonstrates the identity of the issues	39

Page

3. The opinions of the lower courts in Schneiderman demonstrate the identity of the issues 41

4. The opinions in this Court in Schneiderman demonstrate the identity of the issues 43

B. The Marxist-Leninist literature considered in Schneiderman was substantially identical with that relied upon here 46

C. The government's appraisal of Marxism-Leninism cannot be imputed to petitioner 56

D. Under the legal principles applicable to the facts of the two cases, the prior adjudication is a bar to this proceeding 57

Conclusion 66

Table of Authorities Cited

Cases	Pages
Baumgartner v. United States, 322 U.S. 665	25, 33
Bridges v. Wixon, 326 U.S. 135	11, 31
City of New Orleans v. Citizens Bank, 167 U.S. 371	64
Cleveland v. Second National Bank and Trust Co., 149 F. 2d 466 (6 Cir.)	61
Coffey v. United States, 116 U.S. 436	60, 63
Commr. of Internal Revenue v. Sunnen, 333 U.S. 591	60
Cromwell v. County of Sac, 94 U.S. 351	60
Dennis v. United States, 341 U.S. 494	24, 25
Duncan v. Gegan, 101 U.S. 810	62
Frank v. Magnum, 237 U.S. 309	62
Gelston v. Hoyt, 3 Wheat. 246	60
Hartzel v. United States, 332 U.S. 665	24, 25, 26, 33
Haywood v. United States, 268 F. 795	28
In re Potts, 166 U.S. 263	61, 62
In re Sanford Fork and Tool Co., 160 U.S. 247	62
Kammann v. United States, 259 F. 192	29
Klapprott v. United States, 335 U.S. 601	61, 63
Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683	64
Louisville & Nashville Ry. Co. v. Ohio Valley Tie Co., 242 U.S. 288	60
New Orleans v. Citizens Bank, 167 U.S. 371	61
Schneiderman v. United States, 320 U.S. 118	passim
Sealfon v. United States, 332 U.S. 575	37, 57, 62, 64, 65
Sewerage Commission v. Activated Sludge, Inc., 81 F.2d 22 (7 Cir.)	61
Southern Pacific Ry. Co. v. United States, 168 U.S. 1	57, 59, 62, 64
Stack v. Boyle, 342 U.S. 1	25
Stromberg v. California, 283 U.S. 359	64
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381	60

Pages

United States v. Baltimore & Ohio RR. Co., 229 U.S. 244 ..... 57, 58, 60, 63, 64
United States v. De Angelo, 138 F.2d 466 (3 Cir.) 65
United States v. Munsingwear, 340 U.S. 36 60
United States v. Oppenheimer, 242 U.S. 85 62
United States v. Williams, 341 U.S. 58 57

Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 64
Wolf v. United States, 259 F. 388 29

Constitutions

United States Constitution:
First Amendment 2, 22
Fifth Amendment 2, 62
Sixth Amendment 2

Codes

18 U.S.C. (1946 Ed.), Sections 10, 11 2

18 U.S.C. (1948 Ed.), Sections 371, 2385 2

28 U.S.C., Section 1254(1) 2

50 U.S.C., Section 783(f) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 7

WILLIAM SCHNEIDERMAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (Clk.R. 105)[1] is reported at 235 Fed. 2d 146. The written opinions of the

[1]The clerk's transcript printed herein will be referred to as "Clk.R."; the reporter's transcript as "R."; the printed "Appendix to Appellee's Brief" as "A"; and the "Appendix to Appellants' Brief" as "App. Item". The last mentioned Appendix is made up of numbered items, and the number of the item referred to as well as the pages of the appendix at which it is found will be indicated in each instance. The original exhibits on file here will be referred to as "Ex." Both the "Appendix to Appellee's Brief", "A" and the "Appendix to Appellants' Brief", "App. Item" contain selected portions of the Reporter's Transcript and Exhibits.

District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 737; 106 F. Supp. 892; 106 F. Supp. 906.

JURISDICTION.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. A petition for rehearing was timely filed and was denied on June 15, 1955 (Clk.R. 140). On the 27th day of June, 1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955 by the order of Mr. Justice Frankfurter. The petition for certiorari was filed on August 10, 1955, and was granted on October 17, 1955 (100 L. Ed. [adv. Rep.] 69, ... U.S. .....). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent provisions of the statutes involved: 18 U.S.C. (1946 Ed.), Sections 10, 11; 18 U.S.C. (1948 Ed.), Sections 371, 2385; 50 U.S.C., Section 783(f); and the constitutional provisions involved; First, Fifth and Sixth Amendments, are set forth in the Appendix hereto.

QUESTIONS PRESENTED.

This brief is in support of the petition in No. 7 which is a companion petition to those numbered 6 and 8, this

term. The questions presented in those petitions and briefs are relied on by petitioner in No. 7. Additionally, petitioner presents these questions:

Whether the evidence was sufficient to support the conviction of petitioner of a conspiracy to violate the Smith Act.

Whether the Government was barred by the principles of *res judicata* and collateral estoppel to litigate again against petitioner issues decided adversely to the Government in *Schneiderman v. United States*, 320 U.S. 118.

STATEMENT OF THE CASE.

INTRODUCTION.

Petitioner in No. 7 is William Schneiderman, the same man (R. 11727) who was before this Court thirteen years ago when the Government sought unsuccessfully to cancel his certificate of naturalization (320 U.S. 118). In its landmark decision then, this Court laid down fundamental principles of constitutional law, at once in the special field of citizenship and denaturalization, and as well in the broad area of freedom of opinion, belief and expression.

Save for the element of conspiracy charged in the indictment below (Clk.R. 1), the Government proceeded here upon essentially the same charge against petitioner that this Court considered in 1943. Necessary components of the indictment below—Schneiderman's allegedly unlawful interpretation of the doctrines of Marxism-Leninism, and his asserted intent to bring about the forcible over-

throw of the Government—were in substance identical to the charge and proof in the first proceeding. The heart of the Government's proof in both cases—the books comprising the principles of Marxism-Leninism and said to contain the forbidden advocacy twice sought to be attributed to petitioner—was just the same.

A review of the evidence as it related to petitioner is thus essential in order properly to evaluate the fundamental argument made here that the principles of *res judicata* and collateral estoppel bar this proceeding. The review is as useful to support the further arguments that the evidence was insufficient to sustain petitioner's conviction of a conspiracy to violate the Smith Act, and that petitioner is fully entitled to a reversal of the judgment upon the several substantial points urged in briefs in companion cases hereto, upon which petitioner equally relies.

The trial Court permitted testimony of what petitioner has said and done over a period of almost two decades from 1934 to the time of trial. Since 1935, petitioner has been either the district organizer or the chairman of the Communist Party in California (R. 455; 3944; 5445; 11229; 12049, etc.). Necessarily, no little part of the record was devoted to petitioner, his views, his acts, his conversations, his speeches. A prosecution witness, one of fourteen paid by the F.B.I. to observe and to listen to the Communist Party and its chairman, informally summarized just about what the record as a whole was destined to show:

> "Q. Did Mr. Schneiderman speak at that meeting?
> A. Mr. Schneiderman spoke at every meeting."
> (R. 1176-7)

The same witness had just spelled out his meaning:

"Q. Mr. Schneiderman appeared there and spoke?

A. He appeared everywhere and he spoke everywhere, sir." (R. 4168).

Notwithstanding the great body of evidence concerning the petitioner, there was nothing in the few utterances attributed to him, as analysis shows, which could in any way sustain a finding of his connection with the conspiracy alleged in the indictment or of his possession of the proscribed specific intent. The "sharp conflict" (320 U.S. at 155) which this Court found in the record before it in the earlier proceeding involving petitioner, a conflict on the "crucial issue of advocacy of force and violence", and which the Court noted as a serious weakness in the Government's chain of proof there, was reduced here to no real conflict whatsoever by the lengthy examination below into what the petitioner did and said for seventeen years. There was practically no evidence, outside the books, against petitioner on the "crucial issue".

Although a precisely accurate account is neither possible nor necessary, it may be said that the record here contains reference to not less than fifty occasions[2] on

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[2] 446 1338 4168 5440 7706
455 1688 4169 5445 7719
464 2031 4171 5500 7725
465 2034 4172 5527 7730
611 3571 4173 5590 7732
617 [illegible] 4375 5977 7806
620 3888 4378 6018 7814
621 3940 4391 6112 8061
679 3944 4669 6859 11733
975 4040 4674 7693 12645
1155 4166 4949

which petitioner attended a meeting, or made a speech, or engaged in a less formal conversation. Of these, on perhaps half a dozen occasions petitioner is alleged to have used language which, when distorted by being taken out of context, may arguably be said to be related to the charge of his having embraced the doctrine of advocacy of forcible overthrow of the Government. On the other hand, on at least half a dozen other occasions, his spoken or written words squarely and directly disavow any such advocacy whatever. On the remainder of the occasions, either he is not shown to have said anything at all, or what he said has no direct bearing on what this Court has called before the "crucial issue". On such occasions, his activities, speeches, or remarks—where any at all are shown—related exclusively to unquestionably lawful political activities of the Communist Party or of petitioner himself.

Examination of the details of the evidence in question will show a further significant distinction between the groups of occasions when petitioner is alleged to have said something claimed by the Government to support the charge that he engaged in the proscribed advocacy, and the occasions when he expressly disavowed it. In the case of the former group, the evidence of whether or not petitioner actually said the things he is asserted to have said is in the sharpest conflict. In the case of the latter group, the evidence is wholly free from conflict, and is uncontradicted that the disavowals of advocacy of force and violence were in fact made by petitioner. On at least two occasions the Government itself introduced the evidence (Exs. 21; 153).

Overt Acts.

Of 23 overt acts alleged in the indictment (Clk.R. 4 to 6) evidence was offered as to but one concerning petitioner within the three year period of limitations.

The sixteenth overt act reads: "On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting in Embassy Auditorium, Los Angeles."

Although the record is not clear that anything petitioner said on that occasion is in evidence (R. 8061-65), the inference is permissible that an account of his speech appears in the People's World for January 23, 1950 (Ex. 159-A; R. 8065-6).

From this exhibit, it appears that petitioner discussed "trade and recognition for the New China, or armed intervention" as a vital issue in the 1950 election. He said the people of California would want to know how Senator Sheridan Downey and Congresswoman Helen Gahagan Douglas stood on this issue.

It is plain at least that petitioner said nothing concerning the advocacy of forcible overthrow of the Government, and said or did nothing in furtherance of the conspiracy charged in the indictment. Had he done so, it could not have escaped official attention, since the witness who heard the speech attended the meeting as a secret informer for the F.B.I. and contemporaneously reported what he had heard to that agency (R. 8076).

The Government was constrained accordingly to turn far back in history to produce testimony from which it

could argue that petitioner believed and engaged in the proscribed advocacy.

Petitioner's Remarks:

1. Turning to the first group of incidents, the record shows the testimony of Nat Honig, a notorious and long time government paid informer. It was Honig's testimony that he and petitioner were in Moscow in 1934, petitioner as a representative of the American Communist Party to the Communist International (R. 7693). Petitioner, according to Honig, attended Communist International meetings, listened to reports from various countries, and reported to the American Communist Party about what he heard there.

Honig told of two asserted meetings in mid-June, 1934, at the Red International of Labor Unions and at the Communist International, where the chairman spoke of a report from the American Communist Party to the effect that the situation on the San Francisco waterfront at that time furnished an opportunity for a general strike. Petitioner, according to Honig, agreed that a general strike could be produced, and that such a strike would be an excellent rehearsal for seizure of power by the American Party, and that instructions to bring about such a general strike should go to the American Party (R. 7706; 7718).

Honig went on to describe a top fraction meeting in San Francisco in 1936, attended, according to the witness, by Harry Bridges and other waterfront union leaders. Petitioner is alleged to have reminded those present that he had learned in Moscow in 1934 that general strikes

are rehearsals for seizure of power by the Party and the working class, and that the situation then in 1936 was comparable to the one in 1934 and a further general strike could be produced (R. 7725; 7730).

Honig's account of these incidents lacks solidity and conflicts with historical fact. As the trial Court and jury were abundantly shown, and indeed as the witness himself necessarily conceded, the general strike in San Francisco in 1934 was under the direction of a special committee of the San Francisco Labor Council, headed by Edgar (sic) Vandeleur, George Kidwell, John O'Connell, and others, concededly none of them Communists (R. 8253-57). That strike grew out of a strike of longshoremen, whose demands had nothing to do with rehearsing for seizure of power, but were exclusively related to such matters as union recognition, union control of a hiring hall, a six hour day, a thirty hour week, a dollar an hour straight time and a dollar and a half for overtime, and fair working rules (R. 8237-38).

And the Communist Party, far from heeding the orders allegedly sent from Moscow, officially took an entirely different view of the general strike at the time. In a resolution adopted September 5, 1934 (R. 8628), its central committee said "it was the capitalist class which, in panic before the rising giant of class action of the workers, hysterically cried out that this which they could have settled very quickly at any time by the simple expedient of granting the workers' demands, was actually a revolutionary uprising organized by the Communist Party to overthrow the whole capitalist system. Of course, this strike did not have revolution as its objec-

tive, but only the immediate demands of the workers." (R. 8629; Ex. 738).[3]

In 1936, of course, there was no general strike in San Francisco—either to rehearse for a seizure of power or otherwise, nor does the record permit any other conclusion than that petitioner, the unions involved, the Communist Party, and the witness himself all sought to avoid a strike of any kind. Petitioner, according to the Western Worker of September 17, 1936 (Ex. I; R. 1155) said in a radio speech in which he discussed a "part of the California program of the Communist Party in the 1936 election campaign" that:

> "The Communist Party declares that it does *not* advocate or condone the use of force and violence; on the contrary this is the method used by the enemies of labor, by the provocateurs sent into the workers' ranks, by strike breakers and vigilantes.
>
> The Communist Party is not interested in strikes for their own sake. We know full well how costly strikes are for the workers, and their families.
>
> In the present waterfront situation, we hope, as do all friends of labor, that the threat of a strike or lockout will be averted through negotiations and a peaceful settlement, which will take into consideration the just demands of the maritime unions." (R. 1161).[4]

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[3]The resolution is set forth in greater detail in App. Item 98, p. 368.

[4]The attitude of the maritime unions at the time was ably set forth in a report subsequently issued by the Bureau of Labor Statistics of the Department of Labor, entitled "The Maritime Strike of 1936-37" (Ex. IC). The Labor Department report said:

> "When no agreement could be reached on these proposals, the longshoremen's union announced its willingness to with-

Honig himself had a different view of the matter in 1936. As editor of the same Western Worker (R. 8373), Honig caused an editorial to be printed in September 1936 which said in part "the unions have done everything possible to settle the issue through peaceful negotiations, but the employers are forcing the struggle upon them" (R. 8295-6, 8302-4; Exs. ID and IE).

Honig had been a witness in the 1941 proceedings which looked to the deportation of Harry Bridges on the ground of alleged membership in the Communist Party (R. 8489) (Cf. *Bridges v. Wixon*, 326 U. S. 135). While at that hearing he testified about this alleged 1936 top fraction meeting, it is significant he said nothing about rehearsals for seizure of power (R. 8514-16). Despite the peculiarly compelling circumstances in the *Bridges* case, to produce such testimony, the witness had but the lamest excuse below for not having told the story before. He said he didn't consider that he had "an opportunity" to tell it, though he had been asked to repeat all the topics discussed in such 1936 meetings (R. 8514, 8526).

2. The next incident in the first category involving petitioner took place in 1945. The prosecution witness on this occasion was one Daisy Van Dorn, who ran an elevator in the building in which the Communist Party then maintained its offices (R. 7765-66), and informed for the F.B.I. on the side (R. 7765). Since other petitioners were equally involved in this incident, the witness's account of a reception given for one Mother Bloor in San

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draw its demands and continue under the existing award, providing the operators would withdraw their proposals. This offer was rejected, the employers insisting that their proposals be incorporated in a new agreement". (R. 8292.)

Francisco during the United Nations Conference is set forth at length and dealt with in argument in the brief in number 6, and will not be repeated here.

However, with respect to petitioner, Mrs. Van Dorn said that on the next day he told her to keep to herself the remarks made by the aged Mrs. Bloor at the reception, that he did not want the information to go through the Party, and that it was not for the rank and file (R. 7817). Mrs. Van Dorn, who had joined the Communist Party one month earlier and held no office therein, agreed that she was of the rank and file and gave no explanation of why she should have received such highly confidential information (R. 7998).

The evidence is uncontradicted that the reception in question was held pursuant to printed invitation, and that it was attended by numerous non-Communists (R. 7991-94).

3. The same witness identified a book (Exhibit 251), which she said petitioner told her to guard with care, because it had been smuggled into this country from Russia (R. 7806-7). It was established beyond question, however, that the book passed regularly through Customs for sale in bookstores in the United States (Exs. HT-1, HT-2; R. 11132), and that copies, purchased from a London bookseller, were on the shelves of the Los Angeles Public Library (R. 8033).

4. In February, 1946, according to another prosecution witness, petitioner spoke concerning the convention that had reconstituted the Communist Party following the dissolution of the Communist Political Association. In

the course of these remarks, petitioner is alleged to have stated that the Party was "being reconstituted toward a purely Marxist-Leninist line". He is said to have assured the members present that the Party was embarking on a purely Marxist role, "which was the playing of a revolutionary role in society" (R. 4375).

However, the same witness learned in Communist Party classes that, according to Marxism-Leninism, revolution meant a change from capitalism to socialism (R. 4913). The trial Court took the same view, instructing the jury, *inter alia*, that ". . . revolution does not necessarily involve force and violence" (Instr. J; App. Item 2-M, p. 56).

5. Another incident in the first category is said to have occurred in February, 1947. Government witness William Foard testified that petitioner spoke at a Communist Party meeting in San Francisco on left sectarianism and right deviations. The proof of this incident is considerably weakened by the fact that the record reflects grave doubt as to whether the meeting the witness described was in fact ever held.

Foard professed to be certain that petitioner's speech was made at the second of two meetings held by the Party in that same period and at the same hall (R. 4893-4896; 4899). While the record is uncontradicted that one of these, a public affair identified in the record as the "Williamson" meeting, was actually held,[5] the witness insisted that this was not the same meeting at which

[5]Exs. EZ, FA, FB, FC, FD and FE; R. 4892-93.

petitioner spoke (R. 4896). But the original rental card of the building shows unmistakably that only one meeting was held by the Communist Party during the months of January, February and March, 1947 (Ex. ML; R. 11584). Since that one was indisputably the "Williamson" meeting, Foard's recollection of the entire incident lacks weight.

Under this cloud of doubt as to his credibility, the witness Foard testified that petitioner told the meeting that the Party was still on the Marxist-Leninist line. He said the expelled left sectarians (see brief in 6 herein) were like the horse that is too far ahead of the cart, that they were impatient, that they wanted the Party to embark on adventurous campaigns, that they criticized the Party for not being revolutionary. He assured the members that "we were", that before the revolution can be thought of the Party must first build a mass base among labor, farmers and minority groups, that revolution is a serious business and not something to shrug or laugh off.

Petitioner is supposed to have said further at this February, 1947, meeting that revolution means tragedy and bloodshed and that he doubted if many Party members were ready for revolution; that it meant sacrifices, loss of property, person and life, but that these were expendable to achieve the goal of socialism. "The Party was just not prepared for revolution and the majority of the members of the Party weren't conscious of the seriousness of it". Petitioner is said to have gone on to say, at that meeting, that the ultimate goal of the Communist Party was the establishment of socialism and that this could only be done through violent revolution, that "the masters

of finance capital would never give in without a fight". He is said further to have criticized Browder for having tied the Party to "the coat of the bourgeoisie", that Browder had anesthetized the revolutionary potential of the Party. He is said to have added that there were still many Browder deviations in the Party and that a new education campaign was needed to get rid of them (R. 4378-81).

All this was cast in a new light, however, when Foard testified to his own training in Marxism-Leninism while in the Communist Party: that a transition however accomplished from capitalism to socialism would be a "drastic change" and hence a revolution; that if some part of the process would be violent, this would be because the minority would not permit the majority to effect such a change peacefully (R. 4912-13). The witness' testimony further confirmed that everything he attributed to petitioner at the February 1947 meeting was consistent with the prediction (not the advocacy) within the Party that when the majority of the American people should exercise their free choice to establish socialism, a minority would not be willing to accept such a change peacefully.

These, then, are the few incidents to which the Government may point, and indeed did point below, to establish petitioner's adherence to the doctrine of advocacy of forcible overthrow of the Government, his connection with the conspiracy charged in the indictment, his intent to bring about the overthrow of the Government by force and violence, all the necessary elements of the offense. None occurred during the period of the Statute of Limitations, December 21, 1948, to December 21, 1951.

Petitioner's Express Disclaimers of Prohibited Advocacy.

This pitiful handful of occasions and remarks is matched by as many in which petitioner is shown in the record consistently to have disavowed the doctrine of advocacy of overthrow of the Government by force and violence.

1. His entire testimony in the District Court in *Schneiderman* was admitted in evidence here (Exs. MM-1 and MM-2).[6] In it he acknowledges his belief in the "essential correctness" of Marxism-Leninism (Ex. MM-1, p. 108) which he said he regarded as a philosophy and science of "politics, economics and social forces" (*id.*, p. 108). As to the Communist Party, he testified, his "understanding and interpretation" of its "program, principle and practice" was as "enunciated in its constitution" (*id.*, p. 365), which as an exhibit to the pleadings there demonstrates a rejection of force and violence as instruments of social change. He explained why he believed the charge made against him, the Party and the doctrines of Marxism-Leninism was a false one.

> "The Communist Party of the United States of American has frequently been accused, as charged in the present Government suit, with advocating force and violence, or advocating the overthrow of the United States Government by force and violence. The basis of these accusations and charges are alleged to be quotations from writings of a whole school of thought known as Marxism, Leninism, or Marxism-Leninism. The accusations and charges misinterpret and distort the position of the Communist Party and

[6]It was rejected, however, on the issue of res judicata and collateral estoppel.

its members in two ways: first, by taking a quotation out of its context without regard to the rest of the context and without regard to the historical conditions and forces in existence at the time the quotation was written or in relation to the period about which it was written, and without regard to the country or countries about which it was written and without regard to the fact that such writings or quotations are generalized theoretical conclusions about general world affairs.

"The second way in which these writings or quotations are misinterpreted in so far as the principles of the Communist Party and its members are concerned is by accepting in toto the individual interpretations of the author or writer as the official position of the Communist Party. While such writings may be and are regarded as contributions for discussion and study, as interpretations of the theory and practice of Marxism and Leninism, these writings may be and are at times in conflict with the principles and generally accepted practices of the Communist Party and its members, and these writings may distort the true position of the Party. Thus, by these means, it is possible to read into a phrase, a quotation, or even a whole book or document, interpretations contrary to the principles and practices of the Communist Party, by those who do not understand the philosophy and political theories of Marxism and Leninism and its application by the Communist Party of the United States of America." (*id.*, p. 368-71.)

He also testified:

"Revolution cannot be imported to one country from another. Neither can it be imposed on any people or any country by the arbitrary will or advocacy or

incitement of any group or party. The transformation of society from one stage to another has taken place in different ways in different countries within the general laws defining historical development. Its reorganization on a socialist basis will likewise have different characteristics, forms and methods within these general laws in each country in accordance with its own special characteristics. Any attempt to draw a mechanical comparison between America and other countries would be contrary to our whole method of Marxist-Leninist analysis." (*id.*, p. 378-79.)

For himself and the Party he specifically and categorically denied the charge made:

"Q. And your organization and you, yourself are striving, through peaceable means, to effect the alignment of the majority of the people in the United States with the views of your organization?

A. That is correct." (R. 12066-7.)

"Q. Do you believe that it will be possible to bring about this socialization by democratic processes in this country?

A. Yes, I do; and I certainly hope so." (Ex. MM-2, p. 867.)

This testimony was given, as reflected by those exhibits, in 1939 (R. 11727), and necessarily demonstrated his state of mind both at that time and as of his naturalization in 1927.

2. More, the record shows, and without contradiction, that he held the same views, of Marxism-Leninism, of the Communist Party's advocacies, and of the doctrine of overthrow of the Government by force and violence, in 1943, and 1951 (R. 11729, 11733). It appears from the

record that petitioner attended a special conference in San Francisco in June, 1943, following a few days after announcement of this Court's decision in *Schneiderman*. Petitioner at that conference described the decision of this Court as an important victory for citizenship rights and civil rights generally, and moreover said that it confirmed many of the teachings of the Party and positions which the Party had taken. He said then he believed the decision upheld his own views of the teachings, activities and theories of the Party which he had given in his own testimony (R. 10957-61).

3. In the fall of 1951, petitioner had a conversation with Oleta O'Connor Yates, one of the petitioners in No. 6. He told her that he thought that a study of the transcript of his testimony in *Schneiderman* would reveal that the issues there were the same as the issues here, and that the books and material dealt with by the Supreme Court were the same that the prosecution would introduce upon the trial of this cause (R. 11733).

Accordingly, from 1927 to 1951, petitioner, when he could be heard, held the view that:

> "The Communists do not desire the use of force and violence. We desire and strive for peaceful and democratic means of removing exploitation and oppression." (Ex. MM-1, p. 373, R. 11926-27.)

4. David Saunders, a Government witness, told the Court below he left the Communist Party because of his disagreement with petitioner. Saunders accused the petitioner, and those who agreed with him, in 1945 "of watering down the version of Marx so it no longer stood for the overthrow of the Government" (R. 975-6). When

petitioner refused to agree with Saunders that the proper course was "open stand up militantly as Communists until we got what we stood for and let the chips fall where they may on that" (R. 1079-80); Saunders quit.[7]

5. Petitioner was elected a delegate to the 1945 National Convention of the Party (R. 621; 2047). At that convention, following which petitioner was re-elected to his position as head of the Party in California (R. 455), the Party adopted its Constitution (Ex. 21, R. 5117).[8] At the 1948 Convention, equally attended by petitioner (R. 2047), further sections were added, the Party thus at both conventions stating its official position on advocacy of force and violence. The Party expressly disclaimed any such advocacy or goal:

> "Section 2: Adherence to or participation in the activities of any clique, group, circle, faction, or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be published by immediate expulsion." (1945 Const. Ex. 21, R. 5117.)

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[7] See the brief in No. 6 for a more extended account of the unremitting struggle waged by petitioner and others against such "leftist" Party members as the witness. The fundamental issue between the two groups was the successful resistance by petitioner and others to the program of the "leftists", who urged that the immediate overthrow of the capitalistic system, and the establishment of socialism, without first winning a majority of the American people to socialism, ought to be the order of the day and the program of the Communist Party (R. 4456, 4674-4708). By overwhelming vote, the "leftists" were expelled for their anti-party activity (R. 4391).

[8] The 1938 Party Constitution, concerning which petitioner testified in *Schneiderman*, was in essential particulars no different from the 1945 and 1948 documents.

"Section 3. Any member shall be expelled from the Party who is found to be a strikebreaker, provocateur, engaged in espionage, or who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies."

"Section 9. Members are obligated to fight with all their strength against any and every effort, whether it comes from abroad or within our country, to destroy the rights of labor and the people, or to impose upon the United States the arbitrary will of any group or party or clique or conspiracy, thereby violating the unqualified right of the majority of the people to direct the destinies of our country." (Added, 1948 convention, Ex. 153, R. 2089.)

6. During the period covered by the statute of limitations, petitioner is shown by the record to have attended a number of meetings (R. 5446), and spoken publicly at others (R. 3571, 8061-3) without any indication of what he said, although each of these had F.B.I. observers in attendance (R. 3523, 4925). At only one of these does the record disclose any indication of the contents of petitioner's talk. In May, 1949, he spoke at San Diego (R. 1338). The witness who told of this, Lloyd Hamlin, also on the payroll of the F.B.I. (R. 1321), said petitioner spoke "on behalf of the leaders of the Communist Party who were indicted in New York" (R. 1344), may also have discussed peace, possibly also this Court's opinion in *Schneiderman*, perhaps stating the Court had held the

Communist Party not to be an advocate of the overthrow of the Government by force and violence (R. 1688-90).

The record is otherwise not significant upon the "crucial issue". Petitioner spoke at a great variety of meetings, and upon a considerable variety of subjects; he was repeatedly introduced and otherwise identified as the State Chairman of the Communist Party in California. Most of his appearances, whether in public or in more private meetings of the Communist Party, were evidently under the close scrutiny of secret informers and agents of the F.B.I. (See, e.g., R. 3523, 3761, 4925.) Had petitioner covertly or openly, during this extended period concerning which evidence was permitted by the trial court, urged anyone to agree with him to plan the advocacy of the overthrow of this Government by force and violence, as speedily as circumstances would permit or at any other time, it is inconceivable that this recommendation would have failed to have found its way into the record here. The inescapable conclusion is that petitioner never did, and never urged another to, engage in the proscribed advocacy.

SUMMARY OF ARGUMENT.

The evidence of petitioner's unlawful intent, and of his connection with the conspiracy charged in the indictment, did not meet the standards required by this Court to sustain convictions in the area of the First Amendment. The evidence failed even to meet the requirements imposed by the trial Court in his instructions, and the trial Court

erred in its refusal to grant petitioner's motion for judgment of acquittal.

The evidence adduced showed only that petitioner held office (and membership) in the Communist Party, that he participated in its lawful activities, and that in a few isolated instances he used language which, while concededly not directly advocating overthrow of the Government by force and violence, may where distorted out of context arguably be said to permit the inference that he subscribed to that prohibited doctrine. The evidence of these instances, all from paid informers or from malcontents who left the Communist Party, lacked the necessary weight and solidity to support petitioner's conviction.

The Government was barred by *res judicata* and collateral estoppel from litigating again against petitioner his alleged adherence to forcible overthrow of the Government by reason of his belief in the principles of Marxism-Leninism, and circulation and publication by the Communist Party of the basic books comprising Marxism-Leninism.

The same books relied on by the Government in *Schneiderman v. U. S.*, 320 U.S. 118, were again introduced in evidence here. The only additions were other Marxist-Leninist books which said substantially the same things. Both petitioner and co-petitioner Yates in No. 6, testifying in 1939 and 1952, respectively, established that they understood Marxism-Leninism to mean at least what this Court said it meant in *Schneiderman*.

The Government litigated the alleged meaning of this doctrine and these books once before against petitioner

and may not be heard again to depend upon its interpretation of the same books and doctrine as constituting the prohibited advocacy when it lost on that issue in this Court before.

Res judicata and collateral estoppel do not depend upon identity of evidence, and are applicable notwithstanding that the earlier proceeding was of a different form.

In its rulings on motion to dismiss the indictment, on the admissibility of evidence, and on motion for judgment of acquittal the trial Court erred in excluding entirely from the case any consideration of the application of the principles of *res judicata* and collateral estoppel.

ARGUMENT.

I.

THE EVIDENCE WAS NOT CLEAR, CONVINCING AND UNEQUIVOCAL, IT LACKED SOLIDITY, AND HENCE WAS INSUFFICIENT TO ESTABLISH PETITIONER'S CONNECTION WITH THE CONSPIRACY CHARGED IN THE INDICTMENT, AND HIS SPECIFIC INTENT TO ADVOCATE AND TO BRING ABOUT THE OVERTHROW OF THE GOVERNMENT BY FORCE AND VIOLENCE.

Decisions of this Court leave no room for doubt of the tests of the quality of evidence requisite to sustain a conviction of a crime that invades the area shielded by the First Amendment. The Smith Act, of course, is such a statute (*Dennis v. United States*, 341 U.S. 494).

This Court said in *Hartzel v. United States*, 332 U.S. 665, 686:

"... such legislation, being penal in nature, and restricting the right to speak and write freely, must

be construed narrowly, and 'must be taken to use its words in a strict and accurate sense' . . .".

In *Dennis,* the Court noted that the Constitution requires a conviction under the Smith Act to be reviewed with "scrupulous care" when there is doubt as to the quantum and quality of proof of a defendant's intent, the nature of his activities, and his power to bring about the evil proscribed by Congress. The test was unanimously approved a year later in *Stack v. Boyle,* 342 U.S. 1.

In parallel, though not penal cases (if anything, requisite proof beyond a reasonable doubt would be still more exacting in penal cases) the Court in *Schneiderman v. United States,* 320 U.S. 118, held evidence to punish in the area of opinion and belief need be "clear, convincing and unequivocal".

Citing and approving *Schneiderman,* the Court a year later in *Baumgartner v. United States,* 322 U.S. 665, unanimously spoke of the requirement of "solid proof", "weighty" proof, "compelling" proof, when the issues involve belief. The Court warned that, deciding such issues, "proof is treacherous and objective judgment, even by the most disciplined minds, precarious" (322 U.S. at 675). Although the evidence in both *Hartzell* and *Baumgartner* appeared to be of a more substantial character than the evidence herein, the Court in both cases held it fell short of the searching tests required by the First Amendment in the areas of belief and opinion. The Court in *Baumgartner,* "putting the Government's case in its most favorable light", found that it "lacks that solidity of proof which leaves no troubling doubt in deciding a

question of such gravity. . . ." 322 U.S. at 670. The Court rejected as insufficient evidence "established by . . . expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory. . . ." (*id.* at 675). The Court required evidence more "compelling" to impose the penalty sought by the Government there (*id.* at 677).

The evidence against William Schneiderman, in whose earlier case this Court defined with care the quality of proof the First Amendment demands, does not meet the high and stringent standards the Court has established. It wholly fails to establish petitioner's specific intent either to advocate or to bring about overthrow of the Government by force and violence, or his connection with the conspiracy alleged in the indictment against him.[9]

The Government was required to prove, beyond a reasonable doubt and by rigorous standards, that petitioner had not alone the specific intent to conspire with others to advocate that his Government should be overthrown by force and violence, but the further specific intent to bring about that event just as speedily as circumstances would permit. This intent is petitioner's state of mind, what he believed, where "proof is treacherous, objective judgment . . . precarious".

The direct evidence on the question is all against the Government. Petitioner's own statements, declarations

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[9]The Court in *Hartzell*, held statutory use of the word "wilfully", in a "highly penal statute restricting freedom of expression", to require proof of a specific intent to do "deliberately and with a specific purpose" the acts proscribed by Congress. The indictment here equally charged petitioner with having "wilfully" conspired (Clk.R. 2).

and affirmations of what he had in mind, what he intended, concerning the forbidden advocacy, uniformly disavowed it. His testimony in the earlier proceeding is direct, unequivocal, free from any doubt. That testimony creates more than a conflict on one of the "crucial issues" here. Rather it creates an insuperable obstacle to the Government's effort to establish by other evidence that petitioner held the prohibited specific intent.

More, the record shows without contradiction that petitioner's own understanding of Marxism-Leninism,[10] what he believed in when he believed in its principles, was unchanged from his naturalization in 1927 to and after the return of the indictment in this case in 1951. On each occasion, over this 24 year period, (in 1939 when he testified in the District Court, in 1943 after this Court's decision, possibly again in 1949 in a speech in San Diego, still again in 1951) petitioner expressed his convictions to be the same. Unswervingly, these were that Marxism-Leninism did not represent, and neither he nor the Communist Party advocated, forcible overthrow of the Government. Thus, the positive, the direct, what petitioner undeniably himself has said about his intent.

Aside from the books comprising Marxism-Leninism, discussed elsewhere in this and companion briefs, and the series of inferences from petitioner's membership and office in the Communist Party, similarly discussed, the evi-

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[10]The only one that is important, according to the instructions of the trial Court:

"You should bear in mind that it is not your own understanding of the meaning of the language of an exhibit, but the defendant's understanding of the meaning of such language that is to be considered in arriving at your verdict." (Instruction No. 14-J 2, R. 13765-6.)

dence on which the Government may rely as proof of petitioner's criminal intent consists of meagre, unrelated and inherently unsubstantial scraps. Together or separately, they wholly lack that "solidity of proof" the Court has held essential.

Remote and Insubstantial Evidence.

The first of these fragments of evidence, in point of time, is found in the testimony of the witness Honig, who told of purported meetings and discussions in Moscow in 1934, relating to the general strike in San Francisco in that year. Honig equally testified to a meeting in 1936 at which petitioner is asserted to have sought his listeners again to bring about a general strike in San Francisco, once more as a supposed "rehearsal for seizure of power".

The events said by the witness to have taken place occurred, if they occurred at all, twelve and fourteen years before the statute of limitations commenced to run upon the charge laid in the indictment, and four to six years before the Smith Act itself was enacted.

It is not clear upon what theory the trial Court admitted testimony of such ancient vintage. The Court told the jury that they could consider, as to any defendant, evidence of events before 1940 only to determine the membership of any such defendant in the Communist Party and whether he had *knowledge* of the Party's nature, character, aims and objectives, and what it may have taught and advocated "during the period covered by the indictment" (Inst. 14-G, App. Item 2-K, p. 47).

But knowledge is not intent. The two are readily distinguishable (*Haywood v. United States*, 268 F. 795, 806).

Even assuming, arguendo, some bearing of the testimony on petitioner's intent at the time of the alleged transactions, it cannot show his specific intent to violate this statute which was enacted so much later.

> "It cannot be presumed that a state of mind, entirely lawful at the time and not accompanied by expressions showing the willingness to violate law, will change into a criminal intent under a future statute (citing cases)". *Wolf v. United States*, 259 F. 388, 393.

See also *Kammann v. United States*, 259 F. 192.

Of equal importance, the evidence itself grossly fails to meet the exacting standards established by this Court for proof in the area of opinion and belief. Directly contrary to the facts of history, and to all of the objective evidence available with respect to the events concerning which the conversations are said to have related, the testimony is neither weighty, compelling, nor solid. The testimony reflects the anticipated effect of eighteen years the "self-deluding medium of memory".

The objective and undisputed evidence shows that the general strike in San Francisco in 1934 was led by known conservative A.F. of L. leaders. It resulted in arbitration of the underlying maritime strike, and the arbitration accomplished evidently seriously needed, and purely economic gains for the workers. The purpose of the industrial dispute, seen from contemporaneous accounts in the record, and seen in the light of history, was wholly and exclusively economic. It had nothing to do with any "rehearsal for seizure of power". There is no evidence whatever in the record that any participant in the 1934 controversy in San Francisco, whether Communist or not, ever

viewed the strike as for any other than its stated purposes, which were lawful and largely accomplished.

Honig's account of the asserted 1936 discussion, which he said looked to another general strike for another "rehearsal for seizure of power" is, if anything, still more unstable. Here the evidence, without dispute, shows that no general strike took place in 1936, nor was it ever proposed either by the unions or by the newspaper which the witness himself edited and which he said was controlled by the Communist Party. The objective evidence further shows that a strike of any kind was strenuously opposed both by the labor unions involved, by the Communist Party, and by petitioner himself.

Finally, on these incidents, the testimony of the witness loses all weight, compulsion, and effectiveness by the witness' admitted failure to have recounted the events when he had every opportunity and occasion to do so ten years earlier. In 1941 the witness testified for the Government in the proceedings looking to Bridges' deportation.

Then, eleven years closer to the putative meeting, Honig said nothing of such a proposal by petitioner. Honig's reason here for having omitted this important bit of testimony is not convincing.

He first testified:

> "Q. Then your recollection is that if you did not testify to such a meeting [in the Bridges case], it was because you were given no opportunity to testify to it, is that right?
>
> A. That is right, yes." (R. 8516).

Yet, when pressed, the witness recalled that he was asked the following questions in the *Bridges* case, and that

they related to the same alleged top fraction meeting at which petitioner is supposed to have spoken of a "rehearsal for seizure of power":

> "Now, tell us, if you will, some of the specific topics that were discussed at any of these meetings."

And again: "Give me anything you can remember about any of these meetings."

These questions, from the *Bridges* case transcript, were read to the witness here (R. 8526). With respect to the latter of the two questions the record shows:

> "Do you remember being asked that question?
>
> A. Yes.
>
> Q. And did you consider the question, 'Give me anything you can remember about any of these meetings', gave you an opportunity to tell about the general strike and the dress rehearsal for revolution?
>
> A. I considered it was not a proper occasion for me to do so." (R. 8526).

Honig, who has testified for the Government in a number and variety of proceedings, revealed other instabilities as a witness. Unwilling to admit serious discrepancies between his testimony in different proceedings, he sought below to attribute the differences in errors in reporting. By soundscriber played to the Court and jury, these asserted errors were conclusively established to be nothing of the kind (Compare R. 10771 with R. 8371, and compare R. 10767 with R. 8413). He also manifested a tendency to tailor his testimony to suit the proceeding. Thus he testified here that petitioner, removing one Carlisle from his post as editor of the Western Worker, criticized Carlisle for a "dilettante attitude", inconsistent with the as-

serted ultimate aim of the Party to bring about a revolution in the United States (R. 7732). But in an earlier proceeding in which the Government sought to establish Carlisle's prohibited advocacy, Honig of course said nothing about a dilettante attitude. This is not clear, convincing, compelling, weighty proof.

Evidence of Criminal Intent Wholly Inadequate.

Other witnesses told of petitioner's remarks in 1945 to the effect that the Communist Party was "going back" to the principles of Marxism-Leninism. Again petitioner is said to have spoken with approval of the "revolutionary role" in society which he said the Communist Party was destined to play. But these speeches of petitioner, on the record here, are not evidence at all of his specific intent to advocate or bring about forcible overthrow of the Government. Clearly, as proof of such specific intent, they wholly lack weight, compulsion, solidity.

Petitioner's testimony in *Schneiderman* demonstrates with considerable precision what petitioner understood by his use of the terms Marxism-Leninism, and revolution. By revolution, petitioner by his own statements, specifically intended a peaceful fundamental change from capitalism to socialism.

In any event, no criminal significance may be attached to petitioner's discussion of the concept revolution. It is presumed that the jury followed the trial Court's instructions in this regard:

> "The term (revolution) implies the fundamental character of the change sought, without reference to the means contemplated to achieve it. It may or may not be accomplished by the use of force and violence. In

other words, revolution does not necessarily involve force and violence." (Instr. 14-J; R. 13765).

The law of the case thus forbids the very inferences the Government would draw concerning petitioner's specific intent from his speeches in 1945 and 1946.

Turning next to 1947 the record is in the sharpest conflict as to whether a meeting was ever held at all at which the witness Foard attributed to petitioner remarks arguably more susceptible of a sinister construction. As has been seen from the record, Foard was very sure of both the time and place of the meeting when the speech was supposed to have been made. But the business records of the place showed clearly that no such meeting was held. A fundamental conflict of this character, particularly when compared to the kind of evidence considered by the Court in *Baumgartner* and *Hartzell*, itself takes from this evidence its essential qualities of solidity and weight.

Moreover, Foard's own account of petitioner's alleged speech, even if believed, shows that petitioner did not advocate, but at the most predicted, violence. Foard says petitioner declared there would be violence because "the masters of finance capital would never give in without a fight" (R. 4380). This Court dealt before with exactly that proposition, and as it related to petitioner's specific intent or state of mind. The Court said in *Schneiderman:*

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—predic-

tion that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (320 U.S. at 157).

The trial Court agreed and established the law of the case. "Prediction or prophesy is not advocacy," he told the jury (Instr. 12-A; App. Item 2-F, p. 32).

Finally, consideration of these few and isolated instances must be had in the light of the record as a whole. Surely, if petitioner had in fact intended to advocate forcible overthrow of the Government, then at some time during the lengthy period covered by the testimony concerning him, a period in which he appeared everywhere and spoke everywhere, and in which hidden informers of the F.B.I. were in constant attendance upon his remarks and activities, he would have said so at least once. The whole record compels the inference that petitioner did not in fact have either specific intent essential to his conviction.

II.

THIS PROCEEDING IS BARRED, AT LEAST AS TO THIS PETITIONER, UNDER THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

A. The decision in Schneiderman v. United States, 320 U.S. 118, concluded the government with respect to the issues it seeks to litigate here.

The primary and determinative factual issues raised by the prosecution's theory of the case here are (1) whether the teaching of Marxism-Leninism by the Communist Party is necessarily the same as the advocacy of the vio-

lent overthrow of the government; and (2) whether, by virtue solely of his membership and officership in the Communist Party plus his participation in its legal activities, a reprehensible interpretation of Marxism-Leninism may be fastened upon petitioner.[11] However, these very factual isues were determined favorably to petitioner in *Schneiderman v. United States*, 320 U.S. 118.

In that proceeding the government sought to prove its charge that Schneiderman was a member of and believed in the principles of an organization which "advised, taught and advocated the overthrow of the government of the United States by force and violence" (App. Item 100, pp. 375-377)[12] by proof that the organization, the Communist Party, circulated and distributed Marxist-Leninist literature and sought to indoctrinate persons in Marxism-Leninism. The evidence in that proceeding, as in this, consisted

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[11]The indictment (Clk. R. 1-6) charges that Schneiderman wilfully conspired with others to violate the Smith Act by "advocating and teaching the duty and necessity of overthrowing the government of the United States by force and violence . . ." and by "organizing . . . a society [to] teach and advocate" such overthrow. It alleges that it was part of this conspiracy that clubs of the Communist Party would be organized, meetings had, literature published and distributed, and classes conducted in which persons "would be indoctrinated in the principles of Marxism-Leninism."

As is pointed out in the opening brief being filed in *Yates et al. v. United States*, this Term No. 6, an essential step in the prosecution's chain of inferences is that the advocacy of the doctrines of Marxism-Leninism is necessarily the advocacy of forcible and violent overthrow of the government of the United States.

[12]The item cited in the text above from the Appendix to Appellants' Brief, and those items immediately following (101-105), contain excerpts from the record in *Schneiderman v. United States*, 320 U.S. 118, as it appears in the files and records of the court below. The same record of course is contained in the files and records of this Court, No. 2, October Term 1942. These records, offered as Exhibits MM3, MM4, and MM5, were not received by the trial Court (R. 125:28-30).

largely of excerpts from the so-called "classics" of Marxism-Leninism which were offered to support the contention that this doctrine must be equated with forcible overthrow of government.

It is our position that this Court's decision in *Schneiderman* determined for purposes of this proceeding (1) that the teaching of Marxism-Leninism by the Communist Party was not necessarily the advocacy of violent overthrow of government; (2) that at least one tenable conclusion to be drawn from the evidence was that the Communist Party desired to achieve its goal of socialism peaceably and by the ballot; (3) that it could not be presumed, merely because of his membership or officership in the Communist Party, that Schneiderman adopted an illegal interpretation of Marxist doctrine; and finally, (4) that absent proof of overt acts indicating that Schneiderman personally adopted a reprehensible interpretation, the government had failed to establish its burden by the clear and unequivocal evidence necessary in a denaturalization case.

Since these factual issues had been conclusively determined between the parties, they should have been so treated upon the trial of this case. But they were not. Motions to dismiss based upon this point were denied (Clk. R. 33, 41); objections to the introduction of Marxist-Leninist books were overruled (R. 516); motions to strike such evidence were denied (R. 731; Clk. R. 63-64); proposed instructions to the jury covering the point were refused (Dfs. Prop. Inst. Nos. 70 and 71; Ex. NC-1; App. Item 2(q), p. 79); the Court refused to receive Schneiderman's testimony in the prior proceedings on the issue of *res judi-*

cata (R. 12,531), and the jury was specifically instructed that *Schneiderman* had not determined "*any of the issues* raised by the indictment here" (Inst. No. 11J1, R. 13,749, App. Item 2(f), p. 30).

These erroneous rulings of the trial Court require at least a reversal of the judgment of conviction, if indeed the government is not precluded altogether from relitigating the issues previously decided.

In its brief in opposition to Schneiderman's petition for the writ here, the government, citing *Sealfon v. United States*, 332 U.S. 575, said that "none of this Court's conclusions in *Schneiderman* as to the nature, methods and purposes of Marxism-Leninism in 1927 or before, or as to the character of Schneiderman's beliefs, teachings and activities in 1927 or before", was a determination favorable to him of facts essential to a conviction upon the indictment here (Br. in Opp. p. 52).

In order to determine whether or not this Court's conclusions in *Schneiderman* were determinations favorable to him here, it is necessary to examine what this Court's conclusions were there, and to determine how the goverment sought to prove its case here.

1. The pleadings in Schneiderman demonstrate the identity of the issues.

Schneiderman was commenced by the filing of a complaint in which the government sought petitioner's denaturalization upon the grounds of illegality and fraud. The complaint charged that Schneiderman, prior to, at the time of, and subsequent to his naturalization, had been a member of and affiliated with, and personally believed in the principles of, the Communist Party, which principles it

was alleged "advised, advocated and taught the overthrow of the government, the Constitution and the laws of the United States by force and violence" (App. Item 100, pp. 374-376).

Schneiderman's answer admitted his membership in the Communist Party but denied that the party had the principles claimed for it by the government. Furthermore, Schneiderman filed a separate defense in which he specifically denied that the Communist Party ever taught and advocated the overthrow of the government of the United States by force and violence; in which he affirmatively alleged that the Communist Party, on the contrary, taught and advocated the defense of the democratic liberties of the American people and the defense of the Constitution of the United States; and in which he affirmatively set forth the Constitution of the Communist Party to demonstrate its rejection of the use of force and violence as an instrument of social change. He also denied that he personally believed in and advocated the, or any, proscribed doctrine (App. Item 101, pp. 379-383).

Thus the pleadings demonstrate that the issues in *Schneiderman* were (1) whether or not the Communist Party by teaching Marxism-Leninism was necessarily advocating the overthrow of the government of the United States by force and violence, and (2) whether or not Schneiderman himself believed in and advocated forcible overthrow of government.

2. The trial record in Schneiderman demonstrates the identity of the issues.

At the trial, which occurred in 1939, the United States Attorney stated that the government expected to show that prior to and at the time of the filing of his declaration of intention, at the time of filing his petition for naturalization, at the time of his admission to citizenship, and "up to the present time", Schneiderman was a member of organizations which taught the unlawful doctrines and himself believed in and advocated such doctrines (App. Item 102, p. 384, Ex. MM-1, pp. 70-71).[13]

Voluminous testimony was introduced on both sides, practically every bit of it relating to the principles of Marxism-Leninism and their interpretation on the question of force and violence, the teaching and advocacy of such principles by the Communist Party, and the knowledge and intent of Schneiderman with relation thereto.

Schneiderman himself testified at great length and was subjected to an extended cross-examination. He unequivocally avowed his belief in the "essential correctness of the Marx [*sic*] theory" and the "philosophy and princi-

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[13]During the course of the trial the United States Attorney repeated this contention on a number of occasions and offered evidence "to exemplify what his [Schneiderman's] state of mind was at that time" (Ex. MM-1, p. 151) and to show his "conduct" and "belief" in order to determine the issue of his attachment to the Constitution (Ex. MM-1, p. 329).

During the argument on a motion for a nonsuit at the conclusion of the government's case, the United States Attorney said:

> "The evidence from these books . . . professes a belief in the policy of Marx and Engels, Lenin and Stalin . . .
>
> "It is our contention that . . . they advocate force and violence; and we believe that a reading of the books . . . shows they contemplate the use of force and violence to bring this about." (Ex. MM-1, pp. 350-351.)

ples of socialism as manifested in the writings of Lenin" (Ex. MM-1, p. 103).[14] He denied, however, and categorically, that the theory or the principles and philosophy as he understood them constituted advocacy of forcible overthrow of government (Ex. MM-1, pp. 369, 373, 376, 395).[15] As to his own hopes and beliefs, Schneiderman testified:

> "Q. Do you believe that it will be possible to bring about this socialization by democratic processes in this country?
>
> A. Yes, I do; and I certainly hope so" (Ex. MM-2, p. 867).

Absent proof that Schneiderman personally harbored any unlawful intent or committed any overt act[16] manifesting his adoption of a reprehensible interpretation of

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[14]He understood Marxism to be "a philosophy and a science [which] delves into the theory of politics and economics and all of the social forces" (Ex. MM-1, p. 108) and a "science which embodies a whole series of economic, political, sociological, moral and philosophical concepts, and a method of seeking and applying human knowledge to the needs of society." (Ex. MM-1, pp. 370-371.)

[15]Schneiderman understood that Communists "do not desire the use of force and violence [but] desire and strive for peaceful and democratic means of removing exploitation and poverty." (Ex. MM-1, p. 373.) He understood further that "This can only be achieved when the majority of the people choose to follow the socialist path by democratic processes." (Ex. MM-1, p. 395.) His view was that only by misrepresentation and distortion could Marxism-Leninism be equated with the advocacy of force and violence as a method of social change (Ex. MM-1, pp. 369-370; 376).

He adopted for himself the extended expressions of two Stanford professors, Harold Chapman Brown and Walter Thompson (Ex. MM-1, p. 475) in which the concept that Marxism-Leninism may be equated with force and violence was rejected (Ex. MM-1, pp. 562, 721, 743).

[16]A police officer who had had Schneiderman under surveillance for years admitted that to his knowledge petitioner had never committed an act of force or violence or indeed any unlawful act

Marxist theory, the prosecution fell back upon the device of reading (as it did here) from isolated passages taken (usually out of context) from the so-called "classics" of Marxism-Leninism. It argued (as it does here) that those excepts permitted an inference that the theories under study did in fact call for forcible overthrow of government, and then proceeded to build the whole structure of inferences required (but, as argued in co-petitioner Yates' brief in No. 6, not legally allowable) to reach the result sought.

While the applicability of the doctrine of *res judicata* and collateral estoppel are not dependent upon a finding that identical evidence was introduced in both cases, it is significant to note that, as will be seen, the documentary evidence introduced in *Schneiderman* was substantially identical with that introduced here. Thus the prosecution relied there, as it does here, on the so-called "classics" to establish its fundamental premise that the teaching of Marxism-Leninism is necessarily the advocacy of forcible and violent overthrow of the government of the United States.

3. The opinions of the lower courts in Schneiderman demonstrate the identity of the issues.

After the matter was submitted to it, the District Court filed a written opinion (33 F.S. 512 [N.D. Calif.]), noting that the government had "placed in evidence many volumes of books and pamphlets which explain the doctrines

(Ex. MM-1, pp. 342-343). What this Court said earlier is equally true now:

> "... there is nothing in the record indicating that he was ever connected with any overt illegal or violent action or with any disturbance of any sort." (320 U.S. at 126.)

of Marx, Engels, Lenin and Stalin, upon which the principles and practices of the Communist Party and its predecessor organizations are based"; that the government had "called upon three witnesses, including defendant, to explain the position of the Communist Party . . . with respect to Communist ends and means"; and that Schneiderman's conduct threw light on his "state of mind" during the probationary period. The Court stated that from the foregoing it reached the conclusion that the Communist Party sought to establish the dictatorship of the proletariat, and that "methods of force and violence" are accepted and necessary to achieve that end, and consequently that the Communist Party "taught and advocated the overthrow of the government by force and violence."[17] A decree revoking Schneiderman's citizenship was accordingly entered.

The appeal to the Court of Appeals challenged the sufficiency of the evidence to support the findings of the District Court that Schneiderman and the Communist Party believed in or advocated the overthrow of the government of the United States by force and violence. It was asserted on the appeal that the evidence did not establish that either Schneiderman or the Communist Party "believed in the overthrow of the government by force

[17]In accordance with these views the District Court made findings of fact that Schneiderman "was a member of and affiliated with and believed in the principles of . . . the Communist Party . . . which . . . advised, advocated and taught the overthrow of the government, Constitution and laws of the United States by force and violence . . ."; that Schneiderman intended to "adhere to and support and defend and advocate the principles and teachings . . . which . . . advised, advocated and taught the overthrow of the government, Constitution and laws of the United States by force and violence" (App. Item 103, pp. 385-387).

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and violence, or advocated or taught such principles" (App. Item 104, p. 388).

The Court of Appeals (119 F.2d 500 [CA 9]) reviewed the history of the case, summarized the pleadings and the trial Court's findings, and affirmed the judgment upon the ground that *since there were sharply conflicting views on the question of whether the teaching of Marxism-Leninism was necessarily the advocacy of violent overthrow of government*, it could not say that the findings of the trial Court were "clearly erroneous".

4. The opinions in this Court in Schneiderman demonstrate the identity of the issues.

In this Court the government pressed its contention that Schneiderman was not attached to the Constitution because he believed in the use of force and violence instead of peaceful means to achieve his desires. Its argument was that the Communist Party of which petitioner was a member advocated and taught such doctrine and that petitioner "therefore" believed in that method of governmental change (320 U.S. 146).

The Court stated this contention in the light of the record there made:

> "Apart from his membership in the League and the Party, the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advocated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends. To find that he so believed and advocated it is necessary, therefore, to find that such was a principle of the organizations to which he belonged and then impute that prin-

> ciple to him on the basis of his activity in those organizations and his statement that he subscribed to their principles . . .'' (320 U.S. at 146-147).

Thus the two basic issues emerged in this Court: (1) Did the advocacy of Marxism-Leninism constitute the advocacy of forcible overthrow of government;[18] and (2) could such views be imputed to petitioner merely because of his membership or officership in the party.

With respect to the *first* issue, this Court observed that the government, ''with commendable candor'',

> ''. . . admits the presence of sharply conflicting views on the issue of force and violence as a party principle, and it also concedes that 'some Communist literature is susceptible of an interpretation more rhetorical than literal.' '' (320 U.S. at 148.)

While the government is apparently less candid today, it was no less vigorous a decade ago in arguing its claims.

> ''It insists, however, that excerpts from the documents on which it particularly relies are enough to show that the trial court's finding that the Communist Party advocated violent overthrow of government was not 'clearly erroneous.' '' (320 U.S. at 148.)

This Court reviewed the Marxist literature relied upon by the government—and indeed the entire record made by it—and found that it had not been established clearly and convincingly that the Communist Party engaged in ad-

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[18]It was to support a finding that "such was a principle" of the party that the government had introduced the "many volumes of books and pamphlets which explain the doctrines of Marx, Engels, Lenin and Stalin . . ."

vocacy of force and violence. Reviewing the government's evidence on this phase of the case, this Court found it to be insufficient to compel the conclusion that the teaching of Marxism-Leninism necessarily meant the advocacy of violent overthrow.

> "A tenable conclusion . . . is that the party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open." (320 U.S. at 157.)

On the *second* issue of whether party doctrine could be imputed to Schneiderman merely because of his membership and officership in the party and participation in its legal activities, the Court said:

> "We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can reexamine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation." (320 U.S. at 158.)

Thus were both issues resolved here favorably to petitioner.

B. The Marxist-Leninist literature considered in Schneiderman was substantially identical with that relied upon here.

Turning now to the literature upon a review of which this Court drew its tenable conclusion, we note first that it was substantially identical with that upon which the government relies here:

1. The Constitution of the Communist Party of the United States (Ex. 5 in *Schneiderman*, Ex. 27 here).
2. Program of the Communist International (Ex. 6A in *Schneiderman*, Ex. 59 here).
3. The Communist Manifesto (Ex. 7A in *Schneiderman*, Ex. 39 here).
4. Lenin's State and Revolution (Ex. 8A in *Schneiderman*, Exs. 11 and 607 here).
5. Lenin's Left-Wing Communism (Ex. 9A in *Schneiderman*, Ex. 503 here).
6. Stalin's The Theory and Practice of Leninism (Ex. 11A in *Schneiderman;* this appears to be substantially identical to Stalin's Foundations of Leninism, Ex. 1 and 606 here).

A brief analysis of the contents of these books, read at length to the jury, quoted at comparable length in brief and appendix below, and which this Court may expect to see once more *in extenso* when the government replies, shows clearly the identity of the propositions previously litigated with those the government urges again to sustain the conviction. Closer examination reveals that not only does the government rely on the same books in both cases to prove the same proposition, but in decisive in-

stances reliance is on identical excerpts from the same books. The government in its brief to the Court of Appeals conceded its heavy dependence on a comparatively few quotations,[19] practically all of which were considered in *Schneiderman*. Finally, where other and different books are found in evidence here, the government's thesis is that such books argue the same propositions, carry the same message, and contain the same proscribed advocacy as the books used before.

Clearly, the government is estopped to relitigate with petitioner on these terms exactly what it sought vigorously, but unsuccessfully, to sustain through the same courts twelve years earlier.

For example, the government refers meaningfully to a quotation from the *Paris Commune* by Lenin (Ex. 492). True, the *Paris Commune* does not appear to have been in evidence in *Schneiderman*, but the government's reference to it is revelatory. It reads, in part:

> "Substantially, the same definition of revolution is quoted twice in the *Paris Commune*. (Ex. 492). See, *ibid*, page 40. (A. 541) The same definition of revolution is found in *State and Revolution*. (Ex. 11, p. 53) It is also found in the *Proletarian Revolution and the Renegade Kautsky* (Ex. 504, p. 23) . . ." (Appellee's Brief in the Court of Appeals, p. 200, n. 74.)

The definition from the several sources, all in evidence here, thus assumed maximum importance to the government. Extensive reliance was placed upon it, both by the prosecutors below, and by their predecessors in *Schneider-*

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[19] In footnote 69, page 192 of that brief, the government said: "Some of the quotations are repeated elsewhere in whole or in part."

man. It reads (composing minor differences in translation as it appears in the considerable variety of sources):

> "I beg respectfully to remind Mr. Kautsky, who knows Marx and Engels by heart, of the following evaluation of the Commune by Engels from the point in view of 'pure democracy'.
>
> Have these gentlemen (the anti-authoritarians) ever seen a revolution? Revolution is undoubtedly the most authoritarian thing possible. It is an act by which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, i.e., by highly authoritative means, and the victorious party is inevitably forced to maintain its supremacy by means of that fear which its arms inspired in the reactionaries . . ."[20]
>
> The necessity of systematically fostering among the masses this and only this point of view about violent revolution lies at the root of the whole of Marx's and Engels' teaching, and it is just the neglect of such propaganda and agitation both by the present predominant Social-Chauvinists and the Kautskyian schools that brings their betrayal of it into prominent relief."

This passage, described by this Court in *Schneiderman* as one of the "bombastic excerpts" from Communist literature, and there deemed insufficient to clothe petitioner with advocacy of overthrow of this government by

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[20]This quotation is in evidence in *Schneiderman* (see Ex. MM-2, p. 706), where the witness Thompson, a professor of political science at Stanford University (Ex. MM-1, p. 475) states that the language can be understood only in light of its historical context (Ex. MM-2, p. 706-7). Professor Thompson's "interpretations" were "recognized" by Schneiderman as "authority" (Ex. MM-1, p. 475).

force and violence, gained repeated attention upon the trial and in the Court of Appeals here.

Despite its treatment by this Court in the earlier case (see 320 U.S. 149, note 36), the identical quotation was again set forth in *haec verba*, to the jury and to the Court of Appeals, by the government here. As examples, not suggested as exhaustive, the language appears in whole or in part at pages 155, 200 and 281, of the government's brief in the Court of Appeals, and in addition at pages 483, 487 and 541 of the Appendix to that brief.

As has been seen, this Court in *Schneiderman* found the conclusion tenable that petitioner, based on his own testimony there, did not subscribe to the doctrine of advocacy of forcible overthrow of the government, nothwithstanding this or subsequent quotations from Marxist-Leninist works. Upon the trial below, co-petitioner Yates testified at length (and see her brief in No. 6) concerning her understanding of these same books or quotations. Asked, for example, about the foregoing excerpt, she noted that it was written "in a period in which there was absolutism, tyranny, in Europe and on the continent or in which the people had no[t] way of expressing themselves . . ." (R. 11526).[21] She added the important observation that the writer was at the time, as was clear when the quotation was read in context, engaged in a polemic against the Anarchists, who held the view that no state whatever would be necessary after the working class should come to power (*id.*).

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[21] Almost fifteen years earlier, Schneiderman, too, had emphasized the importance of evaluating Marxist-Leninist writings in the context of the time, place and circumstances in which they were written (Ex. MM-1, pp. 123, 379).

Petitioner Yates believed her understanding of Marxism-Leninism to be consistent with the Court's analysis in *Schneiderman* (R. 11013-15), and she and petitioner Schneiderman were in substantial agreement on what the doctrines meant to them (R. 11730).

2. Another typical example of the utilization of the some paragraphs, first in *Schneiderman,* and again here, is from the Communist Manifesto:

> "The Communists disdain to conceal their views and aims. They openly declare that their ends can be obtained only by the forcible overthrow of all existing social conditions."

This appears in *Schneiderman* at 320 U.S. 149, note 35, again at 320 U.S. 191.[22] As Exhibit 39 here, the same words appear in the Appendix at page 502 and in the Reporter's Transcript at, *inter alia,* R. 11562-3.

Exactly this excerpt was discussed by co-petitioner Yates on cross-examination (see R. 11563-5). Like petitioner's, her understanding of the quoted language is that it refers only to a fundamental process of social change. Her detailed analysis fully accords with the tenable conclusion that circulation of the Manifesto does not at all mean that petitioner or the Communist Party sought thereby to advocate overthrow of the government by force and violence, or agreed to do so.[23]

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[22] It was introduced as Exhibit 7A in *Schneiderman* and the identical paragraph was read into the record of that case (Ex. MM-1, p. 127).

[23] This was precisely Schneiderman's understanding when he testified concerning this very language in 1939 (Ex. MM-1, p.

3. Again, Engels is said to have sung a "panegyric ['hymn' in some translations] to violent revolution." Despite the fact that this language was before the Court in the earlier case (320 U.S. at 204), the attention of the Court of Appeals was assiduously directed to the same thing, not only at pages 154, 155, and 281 of the government's brief, but once more at page 483 of the Appendix. As a further example, this Court was told before that the program of the Communist International, adopted in 1928, declared revolution to be necessary, among other things, because "only in the process of revolution is the overthrowing class able to purge itself of the dross of the old society and become capable of creating a new society." (320 U.S. 152, note 39a.) The identical document was introduced in the trial below as Exhibit 59,[24] and the government repeatedly called attention to this recommended purging of the dross of old society; at pages 25 and 199 of its brief in the Court of Appeals, and yet again at page 585 of its appendix to that brief. Again attention was directed here to a quotation reading, "the proletarian revolution is impossible without the violent destruction of the bourgeois' governmental machine and the putting of a new one in its place." Utilized before (see 320 U.S. 191),[25] the same quotation appears in a book under a new title in the trial below. In this case the given quotation is found in Foundations of Leninism, Ex-

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[24] In *Schneiderman*, it is Exhibit 6A and the language quoted by the government appears at Ex. MM-1, p. 116.

[25] The document is Exhibit 11A in *Schneiderman* and the quoted language appears at Ex. MM-1, p. 217.

hibits 1 and 606, and is set forth in substance at pages 161 and 198 of the government brief in the Court of Appeals, and again at 471 of the appendix. The last citation indicates that the same quotation appeared not less than six times in the reporter's transcript: pages 1472, 1475, 2191, 11690, 11694, 11697.

This quotation, like the others here considered, was described by co-petitioner Yates in her testimony below to be polemical, directed against one Kautsky and the Anarchists, and to "bear the imprint" of the period in which it was written: 1917, "during the period of the civil war in the Soviet Union" (R. 10914). Compare what this Court said in *Schneiderman:*

> "Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written." (320 U.S. at 154.)

4. Another related set of quotations has had the government's serious attention both in *Schneiderman* and in this case. It appears, from the books in evidence, that Marx once wrote that he contemplated the possibility of a peaceful revolution in England and America. Subsequently both Lenin and Stalin are said to have discussed this possibility, saying that events had so changed that "Marx's restriction no longer applies", or "This qualification made by Marx is no longer valid." This thesis, quoted in full by both majority and minority opinions (see 320 U.S. 155; and 320 U.S. 193) may be found thrice more, in the government's brief in the Court of Appeals at pages 155 and 156, and at pages 470 and 485 of the appendix. In some places the quotation is from *Foundations of Leninism,* Exhibits 1 and 606, and in other places

from *State and Revolution* by Lenin, Exhibits 11 and 607.[26]

The significance of this change from Marx to Lenin, as she understood it, was similarly the subject of testimony by co-petitioner Yates. At R. 10943 *et seq.*; she cited the instance as "a case which demonstrates that Marxists-Leninists will alter their conclusions as new facts emerge and develop . . .", and gave as a further example the fact that Lenin in 1917 did not foresee "the development of the struggle against fascism and the possible new conclusions that would have to be drawn as a result of that particular struggle in the world of 1952" (R. 10947).[27]

5. Perhaps the most abundant repetition of all, and in both proceedings, has been accorded those passages from the books in evidence dealing with the concept of the dictatorship of the proletariat, and what this Court in *Schneiderman* termed "the erection of a new Proletariat state upon the ruins of the old bourgeois state." This process appears to have been treated in the books in evidence in such terms as "annihilation of the old state", or "smashing its bureaucratic machinery", or "breaking up its old apparatus". Verbs of this forceful character were subject to reiterated use by the prosecutors in both proceedings. Quotations including them accordingly may be found in 320 U.S. at pages 149, 150, 151, 152, 153, 195, 201, 206 and 207. Quoting from a series of exhibits in

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[26] In *Schneiderman* it is Exhibit 11A and the language is quoted at Ex. MM-1, p. 216.

[27] In *Schneiderman* a government witness pointed out Marxists "changed their interpretation" (Ex. MM-1, p. 207). The argument around this point is developed more fully in the brief of co-petitioner Yates in No. 6.

evidence here, the government in the Court of Appeals quoted and requoted the same thing at pages 24, 161 and 177 of its brief, to say nothing of pages 469, 471, 484, 485 and 542 of its appendix.

However, it was the understanding of co-petitioner Yates, who interpreted Marxism-Leninism in substantially the same fashion as petitioner (R. 11730), that the language in question was related to slogans familiar in American politics: "Smash Tammany Hall" or "Break Up the Pendergast Machine" (R. 10891, *et seq.*) Referring to a quotation from *The Paris Commune* (Ex. 492), she described her understanding of the process:

> "Well, that means to me that the machinery of one type of state is replaced by the machinery of another type of state. The machinery that has been built up, as Shaw stated, to replace capitalism is replaced by the machinery that is built up to replace socialism, and that this is a necessary process in the construction of a new social order." (R. 10894)[28]

Moreover, asked directly if exactly what this Court said in *Schneiderman* about "the concept of the dictatorship of the proletariat (320 U.S. at 142) was in accord with her understanding of the meaning of the term, she replied, "Yes it is." (R. 11003-4.)

This Court in *Schneiderman*, having before it the same ideas in exactly the same powerful language and generally from the same books, determined that "the concept of the dictatorship of the Proletariat is one loosely used,

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[28]The testimony of Professor Thompson, which it will be remembered, was accepted by Schneiderman as "authority", dealing with these same concepts, was to the same effect (Ex. MM-2, pp. 743-45).

upon which more words than light have been shed." (320 U.S. at 142).[29]

This demonstration, by no means exhaustive, shows that what the government is relying upon here is precisely what it relied upon in *Schneiderman*.

In *Schneiderman*, the government admitted and the Court found that the evidence with respect to the "crucial issue of advocacy of force and violence" by the Communist Party was in sharp conflict (320 U.S. at 155). That conflict, the Court there said, "is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the government." Nor was the government entitled here to relitigate the same issue exactly by assiduously adding to the record new books that say the same things.[30]

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[29]Other quotations which may be similarly analyzed appear repetitively in both proceedings, viz.:

One, from the *Program of the Communist International* (Ex. 59), deals with the asserted significance attached by the authors of the books to immediate or present slogans and demands, as these relate to the ultimate aims of the Communist Party. Substantially the same message, and from the same source in each instance, may be found in *Schneiderman* as Ex. 6A (See MM-1, pp. 109-112). Despite the fact that it was before this Court then (320 U.S. 150, note 37), it is quoted at length at page 21 of the government's brief in the Court of Appeals here.

Another relates to the significance of the difference between "reformist" and "revolutionary" work. These ideas, also carefully considered by this Court as they affected petitioner twelve years ago (320 U.S. 151, note 38), have now appeared repeatedly again below. They are found in Government's Exhibits 1 and 606, *Foundations of Leninism*, and are quoted in full in the government's brief in the Court of Appeals, both at pages 167 and 291. No doubt for emphasis, they again appeared in the appendix to that brief in the Court below at page 478, referring there to their use at the trial at pages 1503 to 1506 of the reporter's transcript.

[30]In the Courts below in the instant case the government made much of the language to be found in the dissenting opinion of

C. The government's appraisal of Marxism-Leninism cannot be imputed to petitioner.

As we have seen, this Court has already held that where a plurality of interpretations of an organization's program may legitimately be made, an unlawful or reprehensible one will not in the absence of supporting evidence of overt acts, be imputed to a respondent in a denaturalization case. Certainly the law can be no different in the case of a defendant in a criminal conspiracy case.

Furthermore, as more fully developed in the brief in No. 6, the variety and sometimes the contrariety of views even within the party as to the proper or "correct" analysis, or interpretation of Marxism-Leninism, the changes from time to time, the conflicts in and shifting of interpretations, make the imputation of any specific view to any specific individual at any specific time a matter of the greatest conjecture and speculation. Petitioner's conduct, as shown by the record, belies the government's contention, and the absence of any overt acts to support that contention is decisive.

Here the record goes further and presents the anomalous situation of the government insisting upon fastening upon petitioner views, which he not only now, but for three

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Chief Justice Stone in *Schneiderman*. In that opinion the Chief Justice took issue with the majority of the Court not on what were the issues for determination but only upon their resolution. His views confirm and underline that the issue there resolved was the same as the issue the prosecution sought to relitigate here:

> "There is abundant documentary evidence of the character already described to support the court's findings that the Communist Party organizations of which petitioner was a member diligently circulated printed matter which advocated the overthrow of the government of the United States by force and violence . . ." (320 U.S. at 190).

decades of his adult life, has emphatically and articulately rejected.

Not only for reasons already stated by this Court, but for those abundantly revealed by this record, no reprehensible interpretation of Marxism-Leninism can be imputed to petitioner.

D. Under the legal principles applicable to the facts of the two cases, the prior adjudication is a bar to this proceeding.

Following the reversal of the judgment by this Court, mandates in the usual form were ultimately spread upon the minutes of the District Court. Thereafter, the naturalization certificate which had previously been surrendered to the Clerk of the trial court was returned (Exs. MM-3, MM-4 and MM-5). Thus the issues between the parties were disposed of by an adjudication which was accepted as final by the government. The principles of *res judicata* and collateral estoppel became applicable thereafter. *Sealfon v. United States*, 332 U.S. 575; *United States v. Baltimore & Ohio RR. Co.*, 229 U.S. 244; *Southern Pacific Ry. Co. v. United States*, 168 U.S. 1.

It is immaterial that in the case at bar the form of the action was a criminal conspiracy for as we have seen, the issues drawn by the indictment and the plea were identical in all essential respects with the issues posed in the naturalization proceeding.[31]

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[31]Since "[t]he core of the two cases was the same" (*United States v. Williams*, 341 U.S. 58, 63), the principles of either *res judicata* or collateral estoppel apply. *Sealfon v. United States*, 332 U.S. 575, 578.

Conceivably the prosecution might have made a new and different issue respecting the books from that which we litigated before by producing evidence of "changed conditions". *United States v. Baltimore & Ohio RR. Co.*, 229 U.S. 244, 254. This would necessarily have had to consist of some new or different *use* by Schneiderman of the basic Marxist-Leninist books, or of a new or different *understanding* by him of the books in question.

But it is clear from the record that nothing was added by the evidence below to that which the government presented in the denaturalization proceeding. In that proceeding it was the books, and the books alone, that established the principles of Marxism-Leninism which the government charged contained the forbidden advocacy. Here it is precisely the same thing. There is no suggestion in the record here of if, how or when Schneiderman *used* the books in a new or different manner from the way in which he used them prior to his denaturalization proceeding. In each case they were simply circulated, distributed and studied for their content. Indeed, the government insisted in both proceedings that the books "speak for themselves".

As to Schneiderman's *understanding* of the books, of the principles of Marxism-Leninism, and of the significance of the circulation of the books and the adoption of their principles by the Communist Party, the record not only fails to show a change, something new for the government to litigate, but it shows affirmatively that there was no change. It shows that Schneiderman and the party warmly greeted this Court's holding that it was a "tenable conclusion" that the party sought socialism by peaceful and

democratic means, declared that this was a correct statement of their understanding of the principles of Marxism-Leninism and printed and circulated copies of the Court's opinion (Ex. KU; R. 11,002). This was exactly Schneiderman's position in that proceeding and this is exactly what he litigated with the government. Therefore, his understanding of Marxism-Leninism, according to the record in this case, had shifted not one bit from what it was when that crucial issue was tried in 1939.

This Court has stated that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in subsequent litigation between the same parties, "and even if the second suit is for a different cause of action, the right, question, or facts once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific Ry. Co. v. United States*, 168 United States 1, 48-49.

For the purposes of this case it is immaterial whether the applicable doctrine be called *res judicata* or collateral estoppel. In the latter situation it has been held that

> ". . . where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted upon the determination of which a finding or verdict was rendered' . . . *But matters which were actually litigated and determined in the first proceeding can-*

> *not later be relitigated.* Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." (*Commr. of Internal Revenue v. Sunnen,* 333 U.S. 591, 597, 598.)

See also *Cromwell v. County of Sac,* 94 U.S. 351, 352-53.

Under the doctrine of these and other cases, the prior decision with respect to the factual issues of the meaning of Marxism-Leninism and Schneiderman's understanding regarding it, would constitute a bar to this indictment by way of collateral estoppel rather than *res judicata.*[32]

It is clear that a party may not relitigate any issue theretofore litigated no matter in how many different forms it casts its action. For example, a determination in a criminal proceeding has been held to be a bar in a civil proceeding (*Coffey v. United States,* 116 U.S. 436); a determination in an admiralty proceeding has been held to be a bar to a civil action (*Gelston v. Hoyt,* 3 Wheat. 246); a determination in an injunction suit has been held to be a bar to an action for damages (*United States v. Munsingwear,* 340 U.S. 36).[33] The question in each case is not what was the form of the action by which the issues

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[32]However, the distinction in terminology is not always closely observed. See *United States v. Baltimore & Ohio R. R. Co.,* 229 U.S. 244, 253, wherein an issue determined in an equity proceeding was "properly held to be *res judicata* as to the facts averred" in a subsequent criminal indictment involving the same issue.

[33]Indeed, these principles have been held applicable to the decisions of administrative tribunals (*Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381; *Louisville & Nashville Ry. Co. v. Ohio Valley Tie Co.,* 242 U.S. 288).

were determined, but rather, what issues were determined (*New Orleans v. Citizens Bank,* 167 U.S. 371).

This must be especially true where, as here, the prior litigation had sought consequences "more serious than a taking of one's property, or the imposition of a fine or other penalty" (*Schneiderman v. United States;* 320 U.S. 118, 122), and where the standard of proof in the prior litigation was "substantially identical with that required in criminal cases—proof beyond a reasonable doubt" (*Klapprott v. United States,* 335 U.S. 601, 612).

For purposes of *res judicata* or collateral estoppel, an examination must be made of the content, and not merely the form, of the Court's decision, in order to ascertain the Court's intent as to the scope and finality of its ruling upon an issue. *In re Potts,* 166 U.S. 263; *Sewerage Commission v. Activated Sludge, Inc.,* 81 F.2d 22 [7 Cir.]; *Cleveland v. Second National Bank and Trust Co.,* 149 F.2d 466 [6 Cir.]. Here this Court clearly declared its intention finally to adjudicate the issues presented to it in the prior case.

> "This disposes of the issues framed by the government's complaint which are here pressed." (320 U.S. 118, 159.)

Those issues, as we have seen, are basically the same as the issues framed in the indictment which the government seeks to press once again. Clearly, this Court's determination of those issues forecloses the government from relitigating them.

Res judicata and collateral estoppel apply to the holdings of appellate as well as trial Courts. *In re Potts,*

166 U.S. 263; *In re Sanford Fork and Tool Co.*, 160 U.S. 247; *Duncan v. Gegan*, 101 U.S. 810.[34] Nor can there be any distinction made between the finality which attaches to an order of reversal and one of affirmance. *Southern Pacific Ry. Co. v. United States*, 168 U.S. 1, 41; *In re Potts*, 166 U.S. 263, 267.

This Court has long since rejected the contention that the principles of *res judicata* and collateral estoppel do not apply to criminal cases and that the principle against repetitious litigation is applicable in criminal cases only to the extent that it is embraced within the narrower confines of the double jeopardy provision of the Fifth Amendment. *Sealfon v. United States*, 332 U.S. 575; *Frank v. Magnum*, 237 U.S. 309; *United States v. Oppenheimer*, 242 U.S. 85.

Indeed, it has been held that even though the burden of proof differs between civil and criminal cases, *res judicata* may apply in such situations.

> "This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on the one side, this claimant is the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. *This was ascertained once for all between the United States and*

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[34] "Before the suit . . . was removed . . . the rank of the appellant's mortgages had been finally settled by the judgment of the Supreme Court of the State on appeal. That was no longer an open question between the parties . . ." (101 U.S. at 812, 813).

> *the claimant,* in the criminal proceeding, *so that the facts cannot again be litigated between them,* as the basis of any statutory punishment denounced as a consequence of the existence of the facts." (*Coffey v. United States,* 116 U.S. 436, 444.)[35]

Controlling on the question here is the holding that a federal criminal prosecution may be barred by the fact that an essential issue was adjudicated favorably to the defendant in a prior civil case in which the United States was plaintiff. *United States v. Baltimore & Ohio R. R. Co.,* 229 U.S. 244. There, as here, a civil action was followed by a criminal prosecution. In the civil action the United States had sought unsuccessfully to enjoin the maintenance of a bridge on certain navigable waters. In denying the relief sought, the Court held that the bridge in question was not subject to the statute relied upon by the government. Thereafter, the government indicted the same defendant, pursuant to the penal provisions of the same statute. This Court affirmed the direction of a not guilty verdict upon the ground that the prior adjudication barred the government.

> "We are of the opinion therefore that as against action by the Secretary of War, the decree in the equity case was properly held to be res judicata as to the facts averred in the indictment and as decisive of the question that in the absence of changed conditions, the bridge in question was not subject to the Act . . ." (229 U.S. at 253-54.)

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[35] This Court has pointed out that there is no substantial difference between the burden of proof required in a denaturalization case and that required in a criminal case (*Klapprott v. United States,* 335 U.S. 601, 612).

So here, absent "changed conditions", the decree in *Schneiderman* bars the government in this proceeding.

Res judicata and collateral estoppel have been applied not only to the ultimate issues decided in the prior adjudication, but also to evidentiary or intermediate issues either necessarily decided or shown to have been actually decided in the earlier cases. *Sealfon v. United States*, 332 U.S. 575; *United States v. Baltimore & Ohio R. R. Co.*, 229 U.S. 244. In determining what questions were adjudicated in the prior case, the entire record, including pleadings, testimony, exhibits, etc., may be examined. *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316. The examination of the record in *Schneiderman* demonstrates without question that the points which the government seeks here to adjudicate were there determined.

Additionally, it is clear that the effect of the doctrines of *res judicata* and collateral estoppel cannot be avoided merely by bringing in more proof, adding new elements to the charge, or bringing forward new witnesses. *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683; *City of New Orleans v. Citizens Bank*, 167 U.S. 371.

Nor can the judgment below be sustained on the basis of evidence dealing with events subsequent to 1943 or 1939 or 1927 (whichever may be the critical date for Schneiderman) because this Court is in no position now to determine upon what evidence the general verdict of the jury was based. *Stromberg v. California*, 283 U.S. 359, 367-68. The question is whether the issue which went to the jury was in whole, *or in part*, the same issue as had been litigated before. *Southern Pacific R. R. Co. v. United States*, 168 U.S. 1, 48; *United States v. Baltimore*

& Ohio R. R. Co., 229 U.S. 244; *Sealfon v. United States*, 332 U.S. 575, 578. Furthermore, any such "additional" evidence was palpably insufficient to sustain the conviction or to controvert that Schneiderman, both here and in his earlier case, never intended to advocate and teach the forcible overthrow of government and did not understand the principles of Marxism-Leninism to include such overthrow.

In view of the prosecution's emphasis upon the proposition that the doctrines of Marxism-Leninism were essentially the same from 1848 onward, that the party in the United States advocated unlawful doctrine from 1919 onward, that Schneiderman's unlawful knowledge and intent were contemporaneous with his joining the party in 1922, it was the plain duty of the trial judge to instruct the jury that these issues (even if considered only evidentiary or intermediate questions) had actually been decided in the prior litigation. Cf. *United States v. De Angelo*, 138 F.2d 466, 468-69 (3 Cir.). By the exclusion of the entire question of *res judicata* or collateral estoppel from the case at every stage, the trial judge, sustained by the Court of Appeals, made any consideration of the impact of the prior litigation entirely impossible.

CONCLUSION.

For these reasons, the judgment as to petitioner Schneiderman must be reversed.

August, 1956.

Respectfully submitted,

ROBERT W. KENNY,

Attorney for Petitioner.

BENJAMIN DREYFUS,

Of Counsel.

(Appendix Follows.)

Appendix

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

18 U.S.C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force of violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U.S.C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U.S.C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or pro-

priety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction . . ."

18 U.S.C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any

act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 7

WILLIAM SCHNEIDERMAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONER.

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Subject Index

	Page
Preliminary statement	2
Opinions below	3
Jurisdiction	3
Questions presented	3
Statutes involved	4
Statement of the case	5
Evidence as to petitioner Al Richmond	5
Evidence as to Philip Marshall Connelly	8
The character and content of the "People's World"	9
Reasons for granting a writ	16
Conclusion	26

Table of Authorities Cited

Cases

	Pages
Baumgartner v. United States, 322 U.S. 665	25
Bridges v. Wixon, 326 U.S. 135	25
DeJonge v. Oregon, 299 U.S. 353	26
Dennis v. United States, 341 U.S. 494	11, 18, 19, 20, 21, 22
Flynn v. United States, 216 F.2d 354, cert. denied, 75 S. Ct. Rep. 295	20
Frankfeld v. United States, 198 F.2d 679, cert. denied, 344 U.S. 922	20
Hartzel v. United States, 322 U.S. 680	25
Near v. Minnesota, 283 U.S. 697	26

Constitutions

Constitution of the United States, First Amendment	23

Statutes

Smith Act (18 U.S.C.):	
Section 2	2, 5, 17, 22, 24
Section 3	17
Section 371	4, 17, 18, 19, 25
Section 2385	4, 25

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF AL RICHMOND AND PHILIP MARSHALL CONNELLY FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Subject Index

		Page
I.	History and the record below show that the unions involved and American Federation of Labor officials, not the Communist Party, conducted and led the San Francisco general strike of 1934	2
II.	The Government was estopped to relitigate the fundamental issue below by the decision adverse to it in Schneiderman v. United States	4
III.	The court's conclusion in Schneiderman v. United States was not "naive", nor "of yesterday", but is living law today	5

Table of Authorities Cited

	Pages
Schneiderman v. United States, 320 U.S. 118	4, 5, 6, 7

In the Supreme Court
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United States

OCTOBER TERM, 1956

No. 7

WILLIAM SCHNEIDERMAN,
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vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONER.

Petitioner, William Schneiderman, respectfully presents this abbreviated reply to the government brief on file herein. No extensive reply is undertaken, for the reason that in his petition for certiorari and opening brief herein, petitioner has dealt with every subject with which the government brief is concerned as it affects him.

I.

HISTORY AND THE RECORD BELOW SHOW THAT THE UNIONS INVOLVED AND AMERICAN FEDERATION OF LABOR OFFICIALS, NOT THE COMMUNIST PARTY, CONDUCTED AND LED THE SAN FRANCISCO GENERAL STRIKE OF 1934.

The government accepts at face value the fanciful testimony of its witness, Honig, that, on orders from Moscow, petitioner concurring, the Communist Party "brought about" the general strike in San Francisco in 1934. Demonstrating a remarkable eclectic taste, the government also accepts without qualification the somewhat boastful claims to credit for the strike written by Sam Darcy, Party leader, in a 1934 issue of *The Communist*.

Honig's account dealt with a time 17 years prior to the occasion of his testimony. Under compelling circumstances nine years earlier, and closer, to the event, Honig had said nothing about the alleged orders from Moscow, or about any "rehearsal for seizure of power".

The government's concentration on this extraordinary testimony of Honig effectively demonstrates the paucity of its case against petitioner.

In his opening brief (pp. 8, 9, 29-32) petitioner showed not only this curious, cyclic quality of Honig's memory, but as well that his account below has little to do with the facts of history, or with contemporary estimates of the strike by the Communist Party itself. In actual fact, a San Francisco Labor Council Committee of American Federation of Labor officials,

composed of Vandeleur, Kidwell, O'Connell, and others, all non-Communists, led the general strike.

It had been thought that, as long ago as 1939, the absurd notion that in 1934 the entire San Francisco labor movement bowed to the will of the Communists had been laid to rest. Dean James M. Landis, as Special Hearing Officer for the Department of Labor, in 1939 presided over an extended and exhaustive examination into the origins and conduct of that strike, as he heard the government's first of its repeated but ultimately futile efforts to prove waterfront labor leader Harry Bridges a Communist. His sober conclusion on this issue was:

> "The evidence with reference to Bridges' associations with the Communist Party during the 1934 strike deserves retelling. Apart from Dietrich's subsequent rationalization that the Albion Hall Group was dominated by Communists, this record cannot be said to establish that the policies pursued by the Longshoremen, the joint strike committee, or the San Francisco Labor Council during the 1934 strike, were Communist policies as such." (In the Matter of Harry R. Bridges, Findings and Conclusions of the Trial Examiner, dated December 28, 1939, United States Department of Labor, p. 123).

II.

THE GOVERNMENT WAS ESTOPPED TO RELITIGATE THE FUNDAMENTAL ISSUE BELOW BY THE DECISION ADVERSE TO IT IN SCHNEIDERMAN v. UNITED STATES.

The government meets petitioner's plea of res judicata and collateral estoppel, based on this Court's decision in *Schneiderman v. United States,* 320 U.S. 118, with a labored effort to distinguish the issue there from the one below. The government says that this Court decided only petitioner's attachment to the Constitution and the good order of the United States in 1927, and claims that petitioner's argument ignores the "proliferation of Communist literature since 1927" published between 1927 and the time of the trial below.

The government's argument ignores entirely that, as this Court said, "petitioner's beliefs" on the "crucial issue of advocacy of force and violence" were exactly what were before this Court for determination in the earlier proceeding. His state of mind is not different in quality from his intent, and his intent both with respect to advocacy and to bringing about overthrow by force and violence was equally a "crucial issue" below in this case.

The fact that examination was had in *Schneiderman* of petitioner's beliefs (or intent, or state of mind) in 1927, and instead in 1948-1951 here, loses all significance when it is seen that the basis of the government's purported proof in both instances is identical: the books comprising the doctrines of Marxism-Leninism, to which petitioner admittedly adheres.

The government's references to "an entire body" and "proliferation" of Communist literature since 1927 glosses easily over the fundamental fact that it is not this literature, but only the older and identical books, on which the government has depended in every Smith Act case beginning with *Dennis*, and now depends to establish petitioner's supposed adherence to force and violence.

In his opening brief (p. 46 et seq) petitioner demonstrated the identity of the Marxist-Leninist books used in *Schneiderman* and used again below. Nowhere in its brief does the government meet petitioner's contention that it was estopped to relitigate against petitioner the issue of his beliefs on the subject of force and violence based on his subscription to Marxism-Leninism as this is expounded in exactly the same volumes of literature sought to be used again in this case.

III.

THE COURT'S CONCLUSION IN SCHNEIDERMAN v. UNITED STATES WAS NOT "NAIVE", NOR "OF YESTERDAY", BUT IS LIVING LAW TODAY.

Ill grace becomes the government's attempt to escape the principles of collateral estoppel and res judicata by its characterization of the Court's opinion, in *Schneiderman v. U.S.*, 320 U.S. 118, as "naive", or at least "of yesterday". For the Court in *Schneiderman* had the government's admission, made with "commendable candor", (320 U.S., at 148) of the basic proposition on which the decision turned.

The same issue is not less important to the case at bar: the obvious existence of sharply conflicting evidence concerning the alleged Communist Party principle of advocacy of force and violence. Since the record below displays the same sharp conflict on the same issue, both fundamental constitutional safeguards of freedom of thought, and basic common sense, would reasonably compel the same frank admission by the government today.

But the judgments here depend entirely upon the thesis that a federal prosecutor's interpretation of Marxism-Leninism as advocacy of force and violence is the only possible meaning of that complex body of doctrine. Hence, the government in its brief has abandoned constitutional principles, common sense, and good taste, to criticize the Court for pursuing to its logical conclusion what the government admitted was true in *Schneiderman*.

Nor was the Court's opinion there, as the government now would imply, quickly out of date and forgotten. The truth is to the contrary. Few decisions have been as frequently cited in the federal courts over the years as the decision in *Schneiderman*.

Reference to Shepard's United States Citations (1943 Supplement to Case Edition, and Supplements through August, 1956) reflect the fact that courts of the United States have cited the decision at least 165 times since it was rendered. The same authority indicates that in only a comparatively few instances was any attempt made to distinguish it as guiding authority.

Notwithstanding the government's disdainful allusions, therefore, the fact is the Court's *Schneiderman* decision has always been, and continues to be, recognized as a landmark of constitutional liberties, and is the soundest basis for petitioner's plea of res judicata and collateral estoppel.

Dated, October 3, 1956.

Respectfully submitted,
ROBERT W. KENNY,
Attorney for Petitioner.

BENJAMIN DREYFUS,
Of Counsel.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Al Richmond and Philip Marshall Connelly respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Record 802) affirming the judgment of conviction herein of the District Court for the Southern District of California, Central Division.

PRELIMINARY STATEMENT.

Al Richmond and Philip Marshall Connelly are two of the fourteen defendants convicted below on a charge of conspiracy to violate Section II of the Smith Act. All of the convictions have been affirmed on appeal. Oleta O'Connor Yates and ten others of the said defendants have filed herein their petition for certiorari.

Petitioners Richmond and Connelly have selected their own separate counsel and proceeded separately because the principal activities leading to their conviction have been those of editors of a newspaper, thus raising sharply questions of freedom of the press which petitioners believe can be best presented through a separate petition on their behalf.

However, certain portions of the Yates petition are equally applicable to petitioners here; and for the sake of brevity when such portions seem applicable, petitioners here will incorporate the same by reference rather than setting them out in full.

Also, petitioners here and petitioners in the Yates petition have, again for the sake of avoiding repetition, filed a joint appendix in connection with both petitions for writ of certiorari.

OPINIONS BELOW.

The opinions of the courts below are noted in the Yates petition and joint appendix.

JURISDICTION.

The jurisdictional statement contained in the Yates petition is incorporated herein by reference.

QUESTIONS PRESENTED.

1. Petitioners Richmond and Connelly hereby adopt by reference as if fully set forth at length the questions numbered "1", "2", "3", "4", "5", "6", "7", "8", and "9" presented in the Yates petition.

2. Petitioners were indicted for conspiring to violate Section 11 of the Smith Act by willfully advocating violent overthrow of the Government and by organizing a society, the Communist Party, that advocated violent overthrow; in so conspiring, so the indictment charged, petitioners had the specific intent of causing the forceful destruction of the Government as speedily as circumstances would permit.

At the trial the only showing as respects petitioners was (a) that they edited and circulated a Communist sponsored newspaper, the content of which at no time contained any advocacy of force and violence, and (b) that they attended and participated in meetings of the Communist Party, which meetings were not shown to have in any way involved advocacy of the proscribed doctrines.

The trial Court refused petitioners' motions for directed verdict of acquittal. The jury returned a verdict of guilty, and the judgment entered thereon was sustained by the Court of Appeals. Two questions thereby arise:

(1) Did the courts below properly construe and interpret 18 USC Section 371 (conspiring to commit an offense against the United States) and 18 USC 2385 (the Smith Act) in holding the above described activities of petitioners constitute an offense prohibited by the said statutes?

(2) If the said statutes were properly construed, does said construction and application to these petitioners constitute a violation of the first amendment's guarantees of a free press, speech and assembly; or of the due process guaranties of the fifth amendment?

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the Yates petition and the joint appendix and are incorporated herein by reference.

STATEMENT OF THE CASE.

As previously noted, petitioners Al Richmond and Philip Marshall Connelly were convicted below on a charge of conspiracy to violate Section II of the Smith Act. The petition of *Yates et al*, in addition to stating facts relating specifically to those petitioners, also states facts equally applicable to petitioners here. Repetition serving no useful purpose, petitioners here adopt such portions of the Statement of Facts contained in the Yates petition as are applicable generally to all petitioners including the petitioners here.

The evidence here can be separated into three sections: One relating to petitioner Al Richmond, another relating to petitioner Philip Marshall Connelly, and a third relating to a newspaper published by said petitioners.

Evidence as to Petitioner Al Richmond.

Petitioner Richmond, who had been Secretary for the Young Communist League of Philadelphia, joined the Communist Party in 1931 (A. 212).[1] He was not shown to have been an officer of the Party at any time. He attended various California Party State conferences (A. 250) and between 1946 and 1949 a number of State Board meetings (A. 223-231, 368). In 1950 Richmond spoke on recruiting at a West Oakland section luncheon where he was introduced as a representative of the State Commit-

[1]Each party filed printed appendices setting forth selected portions of the reporter's record. The appendix to appellants' brief was divided by subject matter into items with each item given a number. The appellants' appendix is referred to herein as "App. Item" followed by the number of the item and the page numbers in said appendix. The letter "A" refers to the appendix to appellee's brief.

tee of the Communist Party (A. 110-12). He was a member of a special committee to help develop preconvention discussions (Ex. 181, p. 1).[2] In 1951, as part of a preconvention discussion, he authored an article entitled "Strike Struggles—Some Key Conclusions" in which he said that "In each strike . . . the enemy of the worker is . . . the capitalist, particularly the big monopoly sections of capital that sets the tone and lays down policy of its entire class" (Ex. 191, p. 3: A. 100-101).

The above evidence illustrates that petitioner Richmond participated in various meetings of the Communist Party. It in no way illustrates, nor is there any other evidence to illustrate, that he ever advocated force and violence or ever proposed the proposition that the Communist Party should advocate force and violence, nor is there any evidence that he ever agreed with other defendants that such advocacy should take place. There is, moreover, no evidence that such advocacy ever took place at the meetings which petitioner Richmond attended. We pass now to a statement of the evidence relevant to his work in the newspaper field.

In 1932 Richmond became a member of the editorial board of *The Daily Worker* (A. 211-18). In 1938 he was selected by the National Committee of the Communist

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[2]The exhibits admitted into evidence exceeded 500 in number and included many full length books. The Court of Appeals pursuant to stipulation of the parties and its order based thereon considered the exhibits on appeal in their original form without printing or reproduction. Copies of the reporter's transcript were prepared by a process known as photo offset printing and these copies were by order of the Court of Appeals accepted as the reporter's record on appeal without further printing. The letter "R" refers to the photo offset copies.

Party to be the editor of *The People's World*, a position which he continued to hold at the time of the indictment. (Ex. 636, A. 10; 367; Ex. 650; A. 112-13; R. 8060-1.)

As editor, he "stressed the Leninist and Marxist approach to every issue in the paper" (R. 3953-4); sought to increase its circulation (A. 35; R. 1686-7 and 1817-2); and in 1949 accepted as just, criticism by the State Board of the Party that the paper had been guilty of white and anti-Mexican chauvinism and pledged to eradicate all vestiges thereof from the paper (Ex. 340; A. 575-5).

As a member of the Communist Party and as editor of the paper, he constantly sought to have the Party promote the paper. At a State convention in 1948 he spoke on "Use of the Press as a Key Political Weapon," confirmed a lack of circulation, and urged that the Party should take steps to increase circulation, to review the content and policy of the press and integrate this work with that of the Party in order to most satisfactorily reach the largest number of the people. In this connection he said:

> "We have been talking here about the fulfillment of the vanguard role of the Party, and the development of the independent role of the working class through a consistent application of the tactic of the united front from below. These are central tasks of our Party. And to fulfill these tasks, it is necessary to build our paper. . . . If we are engaged in a campaign—let us say, a campaign to defeat the Mundt Bill—then the circulation of our paper is not something we must do in addition to the campaign: it is something we must do to ensure the

success of the campaign. The paper must be seen as the instrument to help explain the issue to the masses of people, to help organize them in the struggle around that issue" (Ex. G. p. 7).

Evidence as to Philip Marshall Connelly.

Petitioner Connelly was first shown to have been a member of the Communist Party in 1938 (A. 344-6). As was the case with petitioner Richmond, there was absolutely no showing that petitioner Connelly had ever held any office in the Party.

Again, as was the case with Richmond, Connelly attended various Party meetings. None of these meetings, however, was shown to have in any way involved advocacy of force or violence or any discussion that the Party should so advocate. In 1938 he attended the Party caucus of delegates for a Newspaper Guild convention. While there he stated that he would support the caucus program concerning the adoption of resolutions (including one on the war in Spain and others which the witness did not recall at the time) and the election of a party controlled slate for the International Guild Executive Board at its convention (A. 344-5). In 1940 he attended a Los Angeles County committee meeting where the presidential campaign was discussed, including such slogans as "Don't Support the Imperialist War" and "Vote Communist". At this meeting he said that Communists could do a good job in building up sentiment against war and the war effort (A. 251-2).

At a party meeting in 1941 he called for support of a strike then in progress at North American Aviation,

Inc., and for opposition to the threat to bring in Government troops to end the strike (A. 252-3). In 1946 he attended a Party meeting honoring Elizabeth Gurly Flynn of the National Committee (A. 140-2). At a Party club meeting in 1947 he said he became a member because "it afforded him an opportunity for organization and direction in the struggle" and "the chance to develop leadership" and enabled him "to organize and direct the policies of the union in which he was active" (A. 329-31).

He was present at a meeting at which the question of the Party going underground was discussed (A. 329-32). There is no evidence here or elsewhere in the record that the purpose of going "underground" had any relationship to advocacy of force or violence. There was much evidence that the Party had gone "underground" in the past to protect its members from violence and other illegal acts, and that consideration was being given to going "underground," if the Party is declared illegal, so that it could have a means of regaining its legal status (App. 290, Item 76).

We come now to Petitioner Connelly's activities in connection with newspaper work. During 1949, 1950 and 1951 he was the Los Angeles editor of the *People's World* (A. 204-5, 294-5, 406; Ex. 76). Previously he had participated in efforts to obtain funds and subscriptions for the paper (A. 253-5).

The Character and Content of the "People's World".

The first issue of *The People's World*, published in 1938, describes it as one of a chain of daily papers "that will strike a telling blow against reaction and Fascism

and for Socialism" (Ex. 159, p. 4). Distribution of this newspaper, among both Party members and non-members, the securing of subscriptions to the paper, and in general the promotion of its circulation, were all official parts of the program of the Communist Party (A. 34; 234-35; 253-55). The Party conceived of its newspaper as a means for distributing its ideas, a means of discussing its policies, and also as a method of discussing and proposing political action (Ex. G., p. 7; A. 35, 37, 580-81). Not only were the ideas expressed in *The People's World* to be circulated among Party members, but also distribution of the paper to non-members was to be a means of influencing them towards agreement with the thoughts expressed therein (A. 387-88). As might be expected, the Party exerted control over both the content and the personnel of the paper. The policies to be pursued by the paper were regularly discussed at Party meetings. (Ex. 472; A. 5, 313-15.)

Petitioners edited this newspaper. As editors they were closely associated with its content and with those who discussed its content. As editors they must be held to have advocated what the paper advocated, and to have wished to convince those who read the paper of the ideas which it put forth. And, indeed, if the paper was in fact a vehicle for the advocacy of overthrow of the Government by force and violence, or if the paper was a vehicle for convincing others that such a doctrine was proper, then petitioners here certainly advocated that doctrine. Further, since the policies of the paper may be inferred to have been mutually agreed upon between petitioners and other defendants herein, if the paper

advocated overthrow of the Government by force, then there would be evidence that petitioners here were members of a conspiracy to so advocate. The mere fact, however, that petitioners here edited a newspaper which put forth ideas which were held by the Communist Party, the mere fact that they together with others agreed on the content of the newspaper, the mere fact that they and others sought to circulate the paper widely both among Party members and among non-Party members, all of these facts in themselves show nothing.

The significance of these faces must turn on what actually was put forth by the paper, what petitioners in editing the paper, in circulating the paper, in agreeing with others to edit, print and circulate the paper, what petitioners in participating in these activities and in agreeing to participate in these activities sought to accomplish. What this object was, can be determined only from examination of the contents of the paper itself. An examination of the paper's content demonstrated beyond any doubt that petitioners' activities in connection with the newspaper are entirely inconsistent with the theory that they advocated or agreed to advocate overthrow of the Government by force.

In total some 68 issues of *The People's World* were introduced into evidence, 10 by respondents[3] and 58 by petitioners.[4] There is not a single word in any issue

[3]Exs. 159, 159a, 375, 707, 709, 710, 714, 736a, 737 and 749.

[4]Exhibits D, AK, AL, AM, AN, AO, AP, AQ, DR, DU, DJ, DM, DN, DP, DS, DT, DX, DY, DZ, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FM, GJ, GK, GL, GM, GA, GE, GN, GT, GY, GZ, HA, JM, JR, JS, KA, KD, KE, KF, KH, MG, MH, MI, MJ, MO, MP, MQ, MU, MV, MW, MX.

advocating or susceptible of being construed as advocating the violent overthrow of our Government. The respondent has never made any contention to the contrary,[5] and neither of the courts below stated or intimated that such advocacy could be inferred from any of *The People's World* exhibits. Indeed, an examination of the content of the paper illustrates that if the petitioners in their activities as newspaper editors, publishers and circulators were advocating anything, they were advocating activities which are not only consistent with the existence and growth of democratic forms of government, but which are in fact essential to the functioning of a democratic government. What then is to be found in the columns of *The People's World?*

Like any newspaper this one, too, published book reviews, motion picture, radio, TV and music criticisms, and also articles on various subjects including labor, history, art, sports, etc. Its columns, again like any other newspaper, carried discussions on the important news and issues of the day, national, state and local. Thus, as a matter of practice, in election campaigns *The People's World* urged the voters to turn out and exercise their franchise[6] and endorsed candidates, including those of the major parties.

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[5] In Volume II of the appendix filed by respondent in the Court of Appeals, setting forth the exhibits it relied on, there is not a single quotation from any issue of *The People's World*.

[6] In an editorial, it said, "To bring out the maximum vote to the polls is the big job now left to every individual progressive, to every progressive organization. . . . It is an axiom of politics that the larger the total vote the better the chances of progressive candidates." (Ex. AP.)

It urged support of some propositions on the ballot, e.g., veterans' tax exemption, and it opposed others, including those which imposed restrictions on eligibility of voters and on the right of initiative under California law. (A. Item 22 pp. 131-33; Ex. A., Al., Am., An., Ap.) *The People's World* proposed campaigns to induce Congress and other legislative bodies to effectuate the legislative program which it supported.[7] In 1945 a "special legislative supplement" of the paper was issued in which was discussed the need for post-war governmental planning in the economic area.[8]

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[7]For example, with respect to Taft-Hartley repeal it said, "The law can be repealed. But it is going to take a terrific legislative battle, all the pressure and energy of the entire Labor movement working in unison." (Ex. AQ, App. Item 22, p. 132.)

[8]"Real post-war planning requires that the State government appropriate adequate funds for low-cost housing; for more schools and hospitals, especially in the rural areas; for State aid to cities and rural communities for public development projects and essential municipal services. It requires plans for reconversion of California's war industries to peacetime production, which must be fitted into national reconversion plans. It requires that we support our national policy, domestic and foreign, and a United Nations policy, which would guarantee the world markets upon which our domestic prosperity depends. And it demands first of all that we support the policies of President Roosevelt for national unity and a speedy victory."

In addition the paper advocated the appropriation of additional funds for child-care centers, educational facilities, state aid to returning veterans and for more adequate "enforcement machinery for price control and rationing, and to stamp out the black market". Equal pay for women, FEPC, increased old age pensions, the 18-year vote, and a committee on industrial relations were typical of its other legislative proposals. (Ex. DX, App. Item 25, pp. 138-142.) Among the other measures advocated were the Wagner-Dingell-Murray Health Bill (Ex. GK, p. 6), price control legislation (Ex. MU, p. 6) and housing legislation (Ex. MW, p. 6).

The People's World also campaigned for an amendment to the San Francisco city charter on the grounds that the charter as it stood permitted minority rule and was therefore undemocratic.[9] It supported wage increases for the transit workers on municipally owned street-car lines. (Ex. Js., p. 6.) It condemned police brutality, and Petitioner Richmond became a member of a committee which sought "to secure a statement of policy from Mayor Lapham and Police Chief Dullea that any infringement by a police officer of the civil liberties of Negro citizens and other members of minority groups will be cause for immediate dismissal from the force." (Exs. Ke., p. 3; Kf., p. 6.) It opposed some candidates in municipal elections and endorsed others. (Ex. Kh., Sec. 2.)

The People's World had very clear and definite views on both domestic and foreign affairs. At times these views were in accord with those generally held throughout the country. At other times these views were in sharp conflict with those prevailing. But at no time were these views ever consistent with the theory that the paper advocated any but peaceful means of change.

During the Second World War the paper urged that "the election of a U.S. senator and congressman to support the President, and the defeat of those California congressmen who have voted with the obstructionist bloc are all-important to assure a Congress which will not

[9] In connection with the San Francisco Charter campaign, the paper urged "All civic-minded citizens and organizations" to "turn out" at a hearing scheduled to consider Charter changes "and let the city officials know that they want majority rule to prevail in San Francisco". (Ex. JN, App. Item 82, pp. 333-34.)

sabotage the war effort and a democratic peace. This will be the test for all candidates regardless of party labels." (Ex. DP, App. Item 82, pp. 332-3.)

In post-war years it opposed dealing with and lending support to Francisco Franco, the "Fascist dictator" of Spain. (Ex. 159-a, App. Item 27, p. 145.) It urged recognition of and trade with China and opposed United States involvement in war over Formosa. (Ex. 159-a, App. Item 32, pp. 156-7.) It took the position that in order to maintain "the peace of the world" it was necessary to achieve "an accord between the United States and the Soviet Union."[10] It opposed American participation in the Korean War (Ex. Ef., p. 12), saying among other things: "President Truman has thrown our country into a hopeless military adventure." (Ex. Cj, p. 7.) It opposed the Marshall Plan, contending that aid to the people should be administered through the United Nations and that the Marshall Plan was being used to interfere in the internal affairs of the countries being given assistance. (Ex. Ka, p. 6.)

As to domestic issues, *The People's World* constantly expressed itself in favor of a policy of full equality for

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[10] (Ex. AQ, p. 6.) Thus an article written in 1947 by petitioner Richmond states:

> "Let it be understood and underscored: 'Peace in the world depends fundamentally on the cooperation of Soviet Russia and the United States, the two mightiest powers.' This is the beginning of all intelligent thought on the problem of war and peace. And intelligent thought on this most vital of problems is a more solemn tribute to the returning dead than all the bugle calls, all the salutes, all the florid oratory.
>
> "There are some who say that friendship with Soviet Russia is impossible. The answer is: the serious effort has not been made." (Ex. FM, Sec. 2, p. 1.)

the Negro people.[11] The paper strongly supported the demands of organized labor for wage increases and improved working conditions. It called for an end to jurisdictional disputes and for the organization of the unorganized. (Ex. Jn, p. 6.) It advocated labor unity between the AFL and the CIO. (Ex. Kd, p. 6.)

In short, *The People's World* functioned as an organ of opinion covering the panorama of local, state, national and world affairs. Its columns dealt with the major controversial subjects of its time in expressions generally sharp and vigorous. Among the newspapers of our country it represented for the most part a tiny minority voice speaking against the status quo. Change it advocated, beyond any doubt. Equally sure is the fact that it advocated the use of peaceful and democratic methods to achieve such change.

REASONS FOR GRANTING A WRIT.

I.

Petitioners Richmond and Connelly hereby adopt by reference all reasons and arguments for the granting of a writ of certiorari set forth in the Yates petition.

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[11] One article in *The People's World* entitled "Criticism of miseducation in Negro history" advanced the thesis that the history of the Negro people has been misrepresented in many phases of our national life, particularly in motion pictures, and advocates an end to discrimination and segregation. (Ex. 710, p. 5.) The paper proposed the election of a "progressive Negro candidate" and "an end to the disgraceful situation in which Los Angeles has a lily-white City Council". (Ex. FA, p. 6.) It further advocated that segregation and discrimination in the armed forces be ended. (Ex. EJ, p. 6.) It welcomed a decision of the California Supreme Court which protected Negro workers against compulsory membership in Jim Crow unions. (Ex. GK, p. 6.)

II.

The Court of Appeals in deciding this case has misconstrued the decision of this court in *Dennis v. United States*, 341 U.S. 494, and in so doing has announced a principle under which unconstitutional limitations on press, speech and assembly would be and have been imposed.

The defendants in the *Dennis* case were indicted under Sections 2 and 3 of the Smith Act. The offense defined by Section 3 is one of conspiring to violate Section 2. Subsequent to the decision in *Dennis*, the Smith Act was amended and Section 3, the conspiracy provision, was deleted. The indictment in the instant case was made under 18 U.S.C. Section 371, a statute which makes it criminal to conspire to commit any offense against the United States. Petitioners were charged with conspiring to commit the offenses delineated in Section 2 of the Smith Act. Thus both these petitioners and defendants in the *Dennis* case were charged with conspiring to violate Section 2 of the Smith Act. In deciding the instant case, however, the Court of Appeals said:

> "The principles of freedom applied to speech, publication and assembly must be preserved. Under the instant indictment, there are implications which must be considered, but the impact is much less direct than in the Dennis case. As heretofore indicated, the charge here is of a substantive conspiracy to act with a definite objective where one overt act must be alleged. The teaching and advocacy of the duty and necessity of destruction of the government by force and violence, although criminal by substantive enactment, are here by the language of the

charge made subservient to the alleged purpose and object of organizing to advocate and teach with intent to destroy and overthrow as speedily as circumstances permit. The indictment in the Dennis case was entirely different." (Appendix A, p. 14.)

As the quote above shows, the Court of Appeals' decision is based on the assumption that an indictment founded on 18 U.S.C., Section 371, involves inherently less restraint on freedom of the press, speech and assembly than did the form of indictment in the *Dennis* case. This assumption, we think, is patently erroneous. Both indictments were the same in substance. What the Court of Appeals has said is that when a so-called "standard conspiracy" is charged, the problems are somehow basically different from those treated by this Court in the *Dennis* case: In particular, the Court says that the restraints upon the freedoms guaranteed by the First Amendment are somehow less drastic and therefore less to be considered in deciding the case. There is no apparent reason why this should be so. This Court was quite cognizant of the fact that a conspiracy was charged in *Dennis v. The United States*, yet the Court's opinion there and the concurring opinion of Justice Frankfurter treated as of first importance the problem whether the convictions were valid under the First Amendment.

Under the rule of the Court of Appeals here, First Amendment problems would be at best only of secondary importance. It is obvious that such an approach would allow for the imposition of far greater restraints on First Amendment freedoms than would be permissible under the approach which this Court adopted in *Dennis*.

Indeed, as is further discussed infra, the instant case is a striking illustration of such a happening. It is important that this Court review the decision below so that a definitive statement may be had as to the significance, if any, of the technical change in the form of the indictment brought about by the repeal of the conspiracy section of the Smith Act and the subsequent reliance upon Section 371 of Title 18 of the U.S.C.

Moreover, a consideration by this Court is the only way in which the erroneous principle enunciated by the Court of Appeals—that the First Amendment is less important when the indictment is under 18 U.S.C. 371—may be corrected. In this respect it is important to note that future indictments for conspiracy to violate the Smith Act must draw on 18 U.S.C. 371, and therefore that a consideration by this Court of the problems noted above would serve as a guidepost to the lower Courts in their handling of the problems which will inevitably arise.

III.

The Court of Appeals, in deciding this case, has passed upon an important question of the constitutional application of the Smith Act not heretofore considered by this Court.

Heretofore this Court has considered problems similar to the one presented in this case only in *Dennis v. United States*. The opinions in that case are careful to point out that the decision there is restricted to the factual situation there presented. The holding in *Dennis* was

simply that the Smith Act as so applied was constitutional. As to future cases, the Court's opinion stated:

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."

We believe that the instant case is one which bears such marked dissimilarities to the *Dennis* case as to fall within the purview of the paragraph quoted above. The facts upon which the convictions were based in the *Dennis* case are strikingly different from the facts upon which the convictions here rest. In *Dennis* the defendants were the national leaders of the Communist Party, the very highest of officials. They were instrumental in the reconstruction of the Communist Political Association into the Communist Party. They were the chief organizers and directors.

Petitioners here are not national officials of the Party. Indeed, they were never shown to have been officials on any level.[12] They edited a Communist sponsored newspaper; they attended Party meetings and discussed the

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[12]In two Smith Act cases since *Dennis* the defendants have sought certiorari but have been unsuccessful. In both cases the facts were far stronger than those as to our petitioners. *Frankfeld v. United States*, 198 F.2d 679, cert. denied, 344 U.S. 922; The Court of Appeals says, at page 686, "The connection of the defendants with the conspiracy in which the Communist Party was engaged was also amply supported by the testimony. The case as to them was not one of mere membership in the party depending on 'guilt by association'. They were shown to be officers and teachers of the Party." *Flynn v. United States*, 216 F. 2d 354, cert. denied, 75 S. Ct. Rep. 295: "Defendants were national functionaries of the Communist Party. They were the so-called 'second string' national leadership."

newspaper; they sought to promote the circulation of that newspaper. In *Dennis* the defendants, as top level national leaders and officials of the Party, actually circulated and distributed the literature which the jury presumably concluded advocated violent overthrow of the Government. Petitioners here distributed a newspaper which contained no mention at any time of force and violence. Quite to the contrary, that newspaper, insofar as it advocated anything, advocated political action in the best traditions of our democratic heritage.

The practical result of the decision in the *Dennis* case was to prohibit those defendants, upon the proof there made, from circulating materials which advocated violent overthrow of the Government, organizing the Communist Party, and from being Party leaders and organizers. The net result of the decision of the Court of Appeals here is this: Participation in the legal and legitimate activities of the Communist Party is prohibited. Judge Frankfurter, concurring in the *Dennis* case, says:

> "A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For the evidence in this case abundantly illustrates coupled with such advocacy is criticism of defects in our society."

The decision below as to petitioners here is based on no showing whatsoever that they advocated violence but simply on their activities in legal parts of the Party's activities. We believe, that to hold, as the Courts below did hold, that the Smith Act can be constitutionally applied to such facts, presents a substantial question not pre-

sented—indeed reserved—in the *Dennis* case. The Court of Appeals, in affirming the conviction of petitioners, in effect holds that participation in any part of the Communist Party's program, even its legal programs, constitutes sufficient grounds for finding connection with a conspiracy to advocate revolution by force and violence, and sufficient evidence of an intent to bring about such a revolution as speedily as circumstances would permit. It is clear that such a holding imposes restraints upon areas of free speech, press and assembly not involved in the *Dennis* case. This Court should review this case to determine whether the Smith Act can be constitutionally applied, when to apply it results in such far reaching restraints.

IV.

The Courts below permitted an unconstitutional restraint upon freedom of press, speech and assembly by holding that the activities of petitioners proved at trial constitute an offense under the statutes here involved. This error, involving as it does a question as to the scope of the protection afforded by the First Amendment, presents a situation in which review by writ of certiorari is an appropriate remedy.

Petitioners were convicted of conspiring to violate Section 2 of the Smith Act, intending to bring about a forceful revolution as speedily as circumstances would permit. Assuming, for purposes of discussion, that a conspiracy to violate the Smith Act was shown to have existed, it

was further necessary in order to sustain petitioners' convictions to conclude that they had joined the conspiracy and that in joining they had the intent above referred to. The problem is whether it is violative of the First Amendment to permit such conclusions to be based solely on proof of such activities as petitioners were shown to have engaged in.

Petitioners were shown to be members of the Communist Party. This in itself cannot be a basis for criminal prosecution. The trial court so ruled (Inst. 11 K; App. Item 2 f. p. 31); respondent conceded this point below (Appellee's Br. p. 268); and the court below accepted this as a correct statement of the law. (Op. Appendix A, p. 11.) No direct showing was made that petitioners ever advocated violence or agreed to organize others for the purpose of so advocating. No direct showing was made that petitioners ever agreed with the other defendants herein as to anything. It was shown that petitioners and the other defendants discussed the publication, circulation, content, policies, etc., of *The People's World*, and this showing provides a basis for a conclusion that petitioners and the others did agree—"conspire"—as to such matters. However, if the gist of the agreement is to be gleaned from the action which presumably was agreed upon, then the evidence indicates quite clearly that there was no agreement to recommend the use of force to achieve governmental change. The newspaper which petitioners edited pursuant to the inferred agreement never advocated force or violence. It advocated voting, writing congressmen, support of strikes, and similar traditionally American activities. It approved ju-

dicial decisions in support of racial equality. It put forth minority views of vital issues of the day. Assuming that petitioners and other of the defendants conspired, the evidence shows quite clearly what they agreed that petitioners should do, and this was not advocating force and violence.

The evidence showed that petitioners did things in addition to editing, circulating, discussing, etc., the newspaper. They attended meetings of the Party. No showing was made that these meetings considered, not to mention advocated, unlawful conduct. Petitioners spoke at Party meetings. What they said, however, was such things as that strikes should be supported, or that "capitalists" are the enemies of the "workers". Petitioners agreed to support certain Party policies and decisions. Thus petitioner Connelly agreed to back the Party slate for the International Executive Board of the Newspaper Guild, and petitioner Richmond agreed that certain Party criticism of himself relating to chauvinism was correct and that he should attempt to correct this. Yes, petitioners were shown to have agreed to various things, but an agreement as to the advocacy of force or as to the use of the Communist Party to so advocate is conspicuous by its absence.

The Courts below held that the demonstrated activities of petitioners, outlined above, could constitute a conspiracy to violate Section 2 of the Smith Act, and this includes a specific intent to bring about a revolution as soon as possible. It is a proper function of this Court to decide whether that holding constitutes a correct interpretation of the applicable statutes, and, if correct, whether the

statutes as so interpreted and applied violate the First or Fifth Amendment.

In *Bridges v. Wixon*, 326 U.S. 135, this Court undertook to determine whether the proven activities of the petitioner constituted "affiliation" within the meaning of the statute there involved. The problem here is of much the same type. The courts below have held that certain activities of petitioners may constitute a "conspiracy" and also may suffice as proof of a certain specific mental intent. Certainly such an ultimate conclusion as "conspiracy" is one within the purview of this Court's reviewing power. *Baumgartner v. United States*, 322 U.S. 665, 671. The question as to whether established activities may form the basis for the conclusion that a certain intent existed is also a proper question for consideration by this Court. *Hartzel v. United States*, 322 U.S. 680. Considering the breadth of the restraints on speech, press and assembly which would be permissible were petitioners' activities here sufficient to constitute the elements of the charged offense, and considering the seeming arbitrariness of such a conclusion, we believe that Congress would never have intended that the statutes be so applied.

Assuming, however, that the Courts below properly construed and applied 18 U.S.C. 371 and 2385, the question arises whether such an application is constitutional. It seems clear that the restrictions on speech, assembly, and especially press thereby imposed are greater than any heretofore allowed. If the decision is to be measured by its practical consequences, then the holding might be described as follows: Any member of the Communist

Party who in any way participates in any phase of the Party's lawful political activities—discussions, gatherings, newspaper activities—may be properly held to have conspired to advocate violent overthrow of the Government, intending to cause such overthrow as quickly as feasible. If, as the Court said in *Near v. Minnesota*, 283 U.S. 697, 708, statutes such as these "must be tested by (their) operations and effect," then it seems clear that the application made by the Courts below is in violation of the First Amendment. A restraint is imposed upon speech, press and assembly, all lawful in themselves, simply because these activities are conducted under the auspices of the Communist Party. A similar result has been previously condemned by this Court. *DeJonge v. Oregon*, 299 U.S. 353.

It is of paramount importance to constitutional government that the enlarged restraints upon the First Amendment applied below should not survive.

CONCLUSION.

Your petitioners respectfully submit that for the reasons above stated a petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

AUGUSTIN DONOVAN,

Attorney for Petitioners.

Subject Index

	Page
I. Petitioners' arguments have not been mentioned by the brief in opposition	2
II. The brief in opposition begs the question	4
Conclusion	7

Table of Authorities Cited

	Page
18 United States Code, Section 371	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 310

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, PHILIP MARSHALL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY OF AL RICHMOND AND PHILIP MARSHALL CONNELLY TO BRIEF OF UNITED STATES IN OPPOSITION (Pursuant to Rule 24 (4)).

The Government's brief in opposition, although 72 pages in length, contains but scant reference to the specific arguments advanced on behalf of petitioners Rich-

mond and Connelly. Those scant references in no way meet the points which were presented on behalf of these petitioners. Some of petitioners' points were not even mentioned in the Government's brief. The relevant arguments which the brief does contain are simply a statement of the *conclusion* which the Government urges. In short, and in so far as petitioners Richmond and Connelly are concerned, the brief in opposition either begs the question or is irrelevant.

I.

PETITIONERS' ARGUMENTS HAVE NOT BEEN MENTIONED BY THE BRIEF IN OPPOSITION.

A. On pages 17 to 19 of the petition for writ of certiorari this argument was made: The Court of Appeals concluded that when a prosecution for conspiracy to violate the Smith Act is based on 18 U.S.C. Section 371, the limitations of free speech, press and assembly are inconsequential as compared with those present in the *Dennis* case, and therefore the First Amendment does not extend to defendants prosecuted under 18 U.S.C. Section 371 the same protections as were available when the indictment was under the now repealed conspiracy section of the Smith Act; this conclusion is erroneous and made it impossible for the Court below to properly consider petitioners' rights under the First Amendment; it is important that this Court consider whether a prosecution under 18 U.S.C. Section 371 is any different, for First Amendment purposes, than the indictment in *Dennis*, since future indictments will be under Section 371.

The above argument was considered in the Government's reply only as follows:

1. The Government does not contend that the change in the technical form of the indictment has effected any "drastic change". (Brief in Opposition, p. 59.)

2. No reply is made to the contentions of petitioners Richmond and Connelly outlined above.

B. The petition filed for Richmond and Connelly points out on pages 19 to 22 that their convictions raise a question "not presented—indeed reserved—in the *Dennis* case". (pp. 21-22.) That question is whether application of the Smith Act to *these petitioners* violates the First Amendment. The question is new because of the fact that *these petitioners*, unlike the *Dennis* defendants, were not shown to have been party officers, national, state or local; these petitioners, unlike those in *Dennis*, were not shown to have had any connection with the distribution or teaching of those documents which in the *Dennis* case formed the basis for a conclusion that the defendants conspired to advocate violent overthrow of the Government.

The Government seeks to avoid the question thus reserved, and new here, by consciously refusing to distinguish one petitioner from another, and thereby treating any evidence as to one as evidence against all. Thus, the Government brief speaks of "the dominant role of the petitioners in organizing and directing the Communist Party in California" (p. 5), and "petitioners are the principal organizers and leaders of the Communist Party in California". (p. 41.) But these generalizations only obscure the unchallengeable fact that the lengthy record

below contains absolutely no evidence whatever to bring petitioners Richmond and Connelly within such sweeping characterization. All that was shown as to these petitioners was that they participated in clearly lawful party activities, that they published a newspaper which, if "far left" in its views, certainly advocated nothing akin to violence, and further that they discussed this newspaper at Party meetings—"secret" meetings, the Government argues, as if secrecy were itself a crime. Clearly the convictions of petitioners here go far beyond the *Dennis* case and far beyond those later Smith Act cases in which this Court denied certiorari. (See Petition, page 20, note 12.)

To petitioners' contention that the constitutionality of this extension of the *Dennis* case should be considered by this Court, the Government's brief replies with silence.

II.

THE BRIEF IN OPPOSITION BEGS THE QUESTION.

The Government's brief contains two passages relevant to the petition for writ of certiorari filed for Richmond and Connelly. The first of these passages is found at pages 41 to 42, and reads as follows:

> "The First Amendment's guarantee of freedom of press did not preclude the conviction of petitioners Richmond and Connelly. As editors of *The People's World*, a publication established, supported and strictly controlled by the Communist Party in California, they were convicted of playing active and leading roles in the over-all conspiracy charged in the indictment."

The Government asserts that petitioners are not protected by the First Amendment. But of course this is the point in issue. The statement of a conclusion is hardly a weighty argument.

The second relevant passage occurs at pages 49 to 50 of the Government's brief:

> "Petitioners Richmond and Connelly have petitioned separately (Pet. No. 310) on the grounds of the insufficiency of the evidence as to them. Petitioners attempt to disguise their membership in the conspiracy by picturing their activity as the exercise of freedom of the press protected by the First Amendment. Under the charge of the trial judge, these petitioners were not convicted for editing a newspaper, but for membership in a conspiracy advocating the violent overthrow of the Government. The First Amendment does not protect the activities of newspaper editors if those activities are an adjunct to a conspiracy such as that here charged. *United States v. Lebron*, 222 F.2d 531, 536 (C.A.2), pending on petition for certiorari, No. 139 Misc. The evidence showed that it is a Marxist-Leninist tenet that a Party newspaper is necessary to a successful revolution (*supra*, pp. 19-21). That these two petitioners were busy implementing this Party principle constitutes no basis for exempting them from the prohibitions of the Smith Act.
>
> "The activities of petitioners Richmond and Connelly in the conspiracy were no different from those of the other petitioners. They had been active in the State and County committees of the Party which, as we have shown, was where control over the Party apparatus, including Party newspapers, schools and classes was exercised. Their positions as editors do not insulate them from the consequences of the

conspiracy any more than did the functioning in similar positions of the *Dennis* petitioners Davis and Gates."

This, of course, is simply an expansion of the earlier statement. Contrary to what the Government states, the issue raised by petitioners is not simply a matter of the "sufficiency of the evidence". The issue is whether the First Amendment is violated when, as here, the Courts below permit the publishing of a lawful newspaper, the participation in lawful trade-union activities, and the discussion of that newspaper and those union activities to be the basis for a conclusion that petitioners, intending to violently overthrow the Government as quickly as they could, joined a conspiracy to violate Section 2 of the Smith Act. The Government's position seems to be that if the end result of petitioners' activities is of some help to the Communist Party in any of its objects, then petitioners can be found guilty of the offenses here in question and no constitutional problem is involved. We think quite differently.

We think, as was stated in our petition, that the convictions here, realistically viewed, amount to a prohibition against participation in any of the lawful activities of the Communist Party. If petitioners' convictions do not violate the guarantees of free press, speech and assembly, then any party member who participates in any lawful Party function is subject to conviction. (To this argument the Government makes no reply.) No such result was contemplated by this Court when it affirmed the *Dennis* convictions. No such result is proper if the substance of the First Amendment is to be pre-

served. Certainly the question thus presented is of sufficient importance to warrant review by this Court.

CONCLUSION.

Your petitioners respectfully submit that for the reasons above stated a petition for writ of certiorari should be granted and the decision below reversed.

Dated, Oakland, California,
September 23, 1955.

Respectfully submitted,

AUGUSTIN DONOVAN,
Attorney for Petitioners.

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In the Supreme Court
OF THE
United States

October Term, 1956

No. 8

Al Richmond and Philip Marshall Connelly,
Petitioners,

vs.

United States of America.

BRIEF FOR PETITIONERS.

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Subject Index

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes and constitutional provisions involved 2

Statement of the case 3

I.

Proceedings below 3

II.

The evidence concerning petitioners Al Richmond and Philip Marshall Connelly 4

A. Introduction 4

B. Petitioner Al Richmond 5

C. Petitioner Philip Marshall Connelly 12

D. The Daily People's World 17

E. Matters as to which there was no evidence 24

Summary of argument 25

Argument 31

I.

The evidence is insufficient to support the verdicts against petitioners 31

A. The criteria of sufficiency 32

B. The evidence concerning participation in the alleged conspiratorial agreement 39

1. The issue 39

2. Contacts between petitioners and alleged co-conspirators 41

3. Statements attributable to petitioner Richmond 49

4. Statements attributable to petitioner Connelly 55

Page

5. Whether evidence that petitioners edited the Daily People's World constitutes proof that they participated in the alleged conspiracy 60

6. Membership in the Communist Party 82

C. The evidence concerning intent 91

1. The intent to overthrow the government by force and violence 93

2. The intent to cause violent revolution "As speedily as circumstances would permit" 95

II.

Conviction of petitioners on the facts proven in this case violates the First Amendment 99

Conclusion 105

Table of Authorities Cited

Cases	Pages
Baumgartner v. United States, 322 U.S. 665 (1944)	54, 104
Bryan v. United States, 175 F.2d 223 (1949)	34
Curley v. United States, 160 F.2d 229 (1947)	35
Dawes v. United States, 177 F.2d 255 (1949)	35
De Luca v. United States, 298 Fed. 412 (1924)	35
Dennis v. United States, 183 F.2d 201 (2d Cir. 1950)	95, 96, 99, 100
Dennis v. United States, 341 U.S. 494 (1951)	3, 29, 95, 96, 99, 100, 102
Direct Sales Co. v. United States, 319 U.S. 703 (1943)	44, 62
Epstein v. United States, 174 F.2d 754 (1949)	35
Garrison v. United States, 163 F.2d 874 (1947)	34
Glasser v. United States, 315 U.S. 60 (1942)	5, 69
Hammond v. United States, 127 F.2d 752 (1942)	35
Harries v. Thomas, 86 L.J.K.B. 812 (1917)	36
Hartzel v. United States, 322 U.S. 680 (1944)	46, 47, 54
Hodge's Case, 168 Eng. Rep. 1136 (1838)	34
Holland v. United States, 348 U.S. 121 (1954)	34
Hubby v. United States, 150 F. 2d 165 (1945)	34
Kassin v. United States, 87 F.2d 183 (1937)	34
Keegan v. United States, 325 U.S. 478 (1945)	51, 54
Langer v. United States, 76 F.2d 817 (1935)	35
Maryland & Virginia Milk Producers Ass'n v. United States, 193 F.2d 907 (1951)	35
McGuire v. United States, 171 F.2d 136 (1948)	35
McLaughlin v. United States, 26 F.2d 1 (1928)	34
McTyre v. United States, 213 F.2d 65 (1954)	34
Morgan v. United States, 159 F.2d 85 (1947)	35
Nosowitz v. United States, 282 Fed. 575 (1922)	35
Pennsylvania R.R. v. Chamberlain, 288 U.S. 333 (1933)	37
Philyaw v. United States, 29 F.2d 225 (1928)	35

Pages

Regina v. McKay, 107 Can. Crim. Cas. 304 (Sup. Ct. 1953) 36
Remmer v. United States, 205 F.2d 277 (1953), reversed on other grounds, 347 U.S. 227 (1954) 35
Rent v. United States, 209 F.2d 893 (1954) 34
Rex v. Bookbinder, 23 Cr. App. Rep. 59 (1931) 36
Rex v. Carey (1945), 3 W.W.R. 508 (B. C. Ct. App.) 36
Rex v. Carter, 23 Cr. App. Rep. 101 (1931) 36
Rex v. Dawley (1943) D.L.R. 401 (B.C. Ct. App.) 36
Rex v. Demetrio, 59 Ont. L.R. 249 (Sup. Ct. 1926) 36
Rex v. McEwan (1932), 3 W.W.R. 564 (Alb. Sup. Ct.) 36
Rex v. McGrath (1946), 1 W.W.R. 59 (Sask. Ct. App. 1945) 36
Rex v. Tymko, 42 Can. Crim. Cas. 147 (Alb. Sup. Ct. 1924) 36
Rex v. Vinegratsky, 60 Can. Crim. Cas. 258 (Manitoba Ct. App. 1933) 36
Rex v. Yok Yuen (1930), 1 D.L.R. 716 (Ont. Sup. Ct. 1929) 36
Ridenour v. United States, 14 F.2d 888 (1926) 34
Romano v. United States, 9 F.2d 522 (1925) 35
Roukous v. United States, 195 Fed. 353 (1912) 36

Salinger v. United States, 23 F.2d 48 (1927) 35
Sapir v. United States, 216 F.2d 722 (1954) 35, 37
Schino v. United States, 209 F.2d 67 (1953) 35
Schneiderman v. United States, 320 U.S. 118 (1943) .. 28, 40, 54, 85
Sherman v. United States, 268 Fed. 516 (1920) 35
Simon v. United States, 78 F.2d 454 (6th Cir. 1935) 38
Strickland v. United States, 155 F.2d 167 (1946) 34

The King v. Horry (1952), N.Z.L.R. 111 (Ct. App. 1951) .. 36
Tomplain v. United States, 42 F.2d 205 (1930) 34
Tucker v. United States, 224 Fed. 833 (1919) 35

United States v. Babcock, 24 Fed. Cas. 913, No. 14,487 (E.D. Mo. 1876) 34
United States v. Di Re, 332 U.S. 581 (1948) 44
United States v. Falcone, 311 U.S. 205 (1940) 62, 63
United States v. Fenwick, 177 F.2d 488 (1949) 35
United States v. Flynn, Criminal No. 137-7 S.D.N.Y. (1953) 87, 88, 89, 90, 91
United States v. Gasomiser Corp., 7 F.R.D. 712 (D. Del. 1947) 35
United States v. Kelly, 119 F. Supp. 217 (D.C. 1954) 35

Pages

United States v. Laffman, 152 F.2d 393 (1945) 34
United States v. Maghinang, 111 F. Supp. 760 (D. Del. 1953) 35
United States v. Mesarosh, 223 F.2d 449 (3d Cir. 1955) ..95, 98
United States v. Russo, 123 F.2d 420 (3rd Cir. 1941) 34, 38
United States v. Tatcher, 131 F.2d 1002 (1942) 34

Vernon v. United States, 146 Fed. 121 (1906) 35
Vick v. United States, 216 F.2d 228 (1954) 34, 35

Wesson v. United States, 172 F.2d 931 (1949) 35, 38
Wiener v. United States, 282 Fed. 799 (1922) 34

Yoffe v. United States, 153 F.2d 571 (1946) 36

Codes

18 U.S.C. 10, 11 (1946 Ed.) 2

18 U.S.C. 371, 2385 (1948 Ed.) 2

28 U.S.C. 1254(1) 2

Constitutions

United States Constitution, First Amendment..2, 4, 31, 99, 101, 104

Rules

Federal Rules of Criminal Procedure, Rule 29(b) 35

Texts

Bentham, Circumstantial Evidence 187-88 (1825) 105

Bentham, Judicial Evidence 186 (note) (1825) 38

Burill, Circumstantial Evidence 737-38 (1868) 33

55 Col. L. Rev. 549 (1955) 36

38 Geo. L. J. 285 (1950) 36

Pages

Gillett, Indirect and Collateral Evidence 68 (1897) 33

3 Encyclopedia of Evidence 92 (1904) 33

3 Greenleaf, Evidence 32-33 (2d ed. 1853) 33

Wills, Circumstantial Evidence *149 (Amer. ed. 1857) 33

Hammon, Evidence 23 (1907) 33

1 Moore Treatise on Facts (1908), page 600 ..... 33, 38

1 Starkie, Evidence *506 (1826) 33

Wis. L. Rev. 93 (1948) 36

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 8

AL RICHMOND and PHILIP MARSHALL CONNELLY,
Petitioners,
vs.
UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals (Clk. R. 105-139) is reported at 235 F.2d 146. The opinions of the District Court are reported at 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 737; 106 F. Supp. 892; and 106 F. Supp. 906.

JURISDICTION.

The judgment of the Court of Appeals is dated March 17, 1955 and was entered on the same day (Clk.

R. 140). A petition for rehearing was timely filed and was denied on June 15, 1955 (Clk. R. 140). The time for filing petitions for writ of certiorari herein was extended to August 13, 1955 by order of Mr. Justice Frankfurter dated June 27, 1955 (Clk. R. 141). Petition for certiorari was filed on August 10, 1955 and granted on October 17, 1955 (Clk. R. 141). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the evidence was sufficient as to each petitioner to support his conviction for conspiring to violate the Smith Act.

2. Whether the convictions of petitioners on the evidence adduced constitutes a violation of First Amendment guarantees of free speech, press and assembly.

3. In addition petitioners incorporate and rely on the applicable questions presented and arguments thereon in the brief filed in case No. 6.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statutes involved are: 18 U.S.C. 10, 11 (1946 Ed.); 18 U.S.C. 371, 2385 (1948 Ed.). The constitutional provision involved is the First Amendment.

These statutes and the constitutional provision are set out in Appendix A hereto.

STATEMENT OF THE CASE.

I.

PROCEEDINGS BELOW.

On December 21, 1951 petitioners Al Richmond and Philip Marshall Connelly were indicted together with the petitioners in cases Nos. 6 and 7 on a charge of conspiring with each other and with the defendants in the *Dennis* case[1] and with others unknown to the grand jury to (a) wilfully and knowingly advocate the violent overthrow of the Government of the United States, and (b) to organize and help to organize the Communist Party as a group or persons that so advocates, intending, in both instances, to cause said overthrow as speedily as circumstances would permit (Clk. R. 1-2). The indictment charged that, as part of the conspiracy, the alleged conspirators would publish and circulate newspapers teaching and advocating the forcible overthrow of the Government as speedily as circumstances would permit (Clk. R. 3, paragraph 4 of the indictment).

At the close of respondent's case petitioners Richmond and Connelly rested and moved for judgments of acquittal. These motions were denied (Clk. R. 72-74). These motions were renewed when all parties had rested but the Court reserved its ruling. The jury

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[1] *Dennis v. United States*, 341 U.S. 494 (1951).

returned a verdict of guilty. The trial Court thereupon denied the motion for judgment of acquittal notwithstanding the verdict and an alternative motion for new trial (Clk. R. 102-3). Judgments of conviction were entered on August 7, 1952 *(ibid.)*. These judgments were affirmed by the Court of Appeals on March 19, 1955 (Clk. R. 140).

II.

THE EVIDENCE CONCERNING PETITIONERS AL RICHMOND AND PHILIP MARSHALL CONNELLY.

A. Introduction.

For the purposes of this brief it is assumed that somewhere in the lengthy record of this case there is evidence which would suffice to show that two or more of the alleged conspirators did conspire as charged, having the intent charged. In making this assumption we do not mean to imply a belief that such evidence actually exists. We think that quite the contrary is true, that there is no such evidence. However it is our contention that even if the alleged conspiracy was proven as to some persons, the evidence was insufficient to show that petitioners here ever became a part of that conspiracy; and, further, that to permit an inference of petitioners' participation in the alleged conspiracy to be drawn from the evidence adduced as to them constitutes a violation of the First Amendment.

Consequently the recitation of evidence which follows is limited to matters directly involving petitioners Richmond and Connelly, *i.e.* the evidence of what petitioners themselves actually did and said, and, since

their chief activity was the editing of a newspaper, the evidence concerning that publication.[2]

B. Petitioner Al Richmond.

The record contains the following evidence of petitioner Richmond's activities as a journalist on and on behalf of communist newspaper:

1. In the latter part of 1932 petitioner Richmond was on the editorial board of the *Daily Worker* and "was assigned to the waterfront and longshore fraction in New York City" (R. 5354).

2. In 1937 Richmond came to California to work on the *Western Worker* (R. 545-46). The *Western Worker* was a newspaper published by the Communist Party (Ex. 636, p. 4, R. 685; R. 438). During the latter part of 1937 petitioner attended a meeting of the district committee for district 13 of the Communist Party; 12 to 15 other persons were present; the topic under discussion was how to expedite the establishment of a daily newspaper in California, and questions of finance, personnel and subscriptions were considered. (R 440-43).

3. The *Western Worker* ceased publication at the end of 1937 (Ex. 621, R. 689). The *Daily People's World* commenced publication on January 1, 1938 (Ex. 159, R. 687). The December 20, 1937 issue of the *Western Worker* carried a news story which stated that Richmond had been selected by the "Central

[2]It is elementary, of course, that proof of connection with a conspiracy can be proven only through the conduct of the alleged conspirator. *Glasser v. United States*, 315 U.S. 60, 73, 74 (1942).

Committee" to be managing editor of the forthcoming *People's World* (Ex. 636, p. 1, R. 685). A witness testified that after the *People's World* had started, petitioner "became managing editor" (R. 546). He appears as managing editor on the masthead of the August 28, 1939 issue of the *People's World* (Ex. GZ, p. 4, R. 6394).[3] In 1946 Richmond was editor of the *People's World*, a position he continued to hold at the time this case was tried (R. 7795; 3571-72).

4. In 1946 Richmond spoke to a group of Communist Party district managers of the *People's World* at the newspaper's offices in Los Angeles. Respondent's witness, Stephen Wereb, summarizing the content of this talk, said that Richmond discussed "the importance of . . . the *People's World*, in trade union, trade union halls and its Marxist contents. He [Richmond] stressed the Leninist and Marxist approach to every issue of the paper" (R. 3953-54). The witness gave no explanation of what he meant by the "Leninist and Marxist approach."[4]

5. In 1948 Richmond wrote an article entitled "Use the Press as a Key Political Weapon," which was published in the State Convention Report of the California Communist Party (Ex. 186, p. 7, R. 1533). In

[3]That petitioner Richmond's name did not appear as managing editor on the masthead of earlier editions does not necessarily mean that he was not managing editor at an earlier date. Only a few of the issues of the *Daily People's World* actually published in the years prior to his trial were introduced in evidence. One of the earlier issues, that of June 25, 1938, did not list the paper's staff (Ex. D, R. 961).

[4]At another point in his testimony this witness said "I never knew and I still don't know a darn thing about Marxism and Leninism, and I pray God I never do" (R. 4188-89).

this article petitioner bemoans the declining circulation of the *People's World* and then goes on to discuss the relationship of the paper to the Communist Party's political activities. At the end of the article Richmond proposes a series of resolutions designed to remedy the problems he has been discussing.[5]

6. Early in 1949 petitioner addressed a group of 40 to 50 persons at a gathering in the New Palace Hotel in San Diego, urging them to buy and read the *People's World* (R. 1337-38, 1687, 1819-20). The specific purpose of this meeting was to promote the circulation of the *People's World* (R. 1687). As to its sponsorship, respondent's witness said on direct examination that "the party had planned a meeting in the name of the *People's World*" (R. 1337). On cross-examination the witness explained what he meant by "the party planned a meeting": He said, "The meeting itself had been planned in our party clubs, that is, it had been announced and we had been asked for suggestions and so on and so forth. . . ." (R. 1820).

The record contains the following evidence of petitioner Richmond's written and oral statements on subjects other than the *Daily People's World:*

1. Petitioner Richmond wrote a book, *Native Daughter,* which was published in 1942 (Ex. GW, R. 6208). This book is a biography of one Anita Whitney. In it Richmond quotes numerous protests voiced when Miss Whitney, because of her membership in the Communist Party, was convicted of violation of the Cali-

[5]The full text of this article is printed in Appendix B hereto, pp. v-x, *infra.*

fornia criminal syndicalism law. Among those quoted were religious leaders (Ex. GW, p. 132), government officials (*id.* at 125, 132, 139), and newspapers (*id.* at 122, 135).

2. The November 7, 1947 issue of the *People's World* carried an article by Richmond entitled "Save the Peace" (Ex. FM, §2, p. 1, R. 5106). This article says in substance that cooperation between the United States and Russia is essential to world peace, that it is possible to live peacefully with the Russians, and that the policy of the President, Harry S. Truman, was a war policy.[6]

3. During the summer of 1949 a pamphlet on "the struggle against white chauvinism" was distributed and discussed within the California Communist Party (Ex. 330, R. 3555; 3553-56). The pamphlet pointed to recent articles in the *People's World* as examples of chauvinism. Attached to the pamphlet was a copy of an article from the July 15, 1949 issue of the *People's World*. This article, signed by Richmond and others, stated that past issues of the paper had carried stories expressing anti-Negro and anti-Mexican attitudes, and went on to say that this was "especially serious for a paper like the *Daily People's World* which has been . . . in the thick of the battle for the rights of the Negro people and the Mexican-American people. . . .". (R. 3556).[7]

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[6]The full text of this article is printed in Appendix B hereto, pp. x-xiv, *infra*.

[7]The full text of this article is printed in Appendix B hereto, pp. xv-xxi, *infra*.

4. In December of 1950, at the Communist Party West Oakland Section Convention, petitioner Richmond was introduced as "representing the state committee" and spoke briefly "about the necessity of recruiting" (R. 3568-70).

5. In 1950 the California Communist Party published the first issue of a pre-convention discussion bulletin called "The Party Review" (Ex. 181, R. 2832). This bulletin stated that its purpose was to "afford a medium for the exchange of experiences and opinions on a statewide scale in the party's pre-convention discussion. . . . It is designed to . . . provide an instrument through which the major experiences and conclusions of the various party organizations and individual comrades a.e made available to the membership of the entire party in our state. All comrades are invited and urged to write for The Party Review. . . . The state committee has set up a special committee composed of Oleta O'Connor Yates, Hursel Alexander and Al Richmond to help develop the pre-convention discussion. . . ." (Ex. 181, p. 1).

The second issue of "The Party Review" contained an article by Richmond entitled "Strike Struggles—Some Key Conclusions" (Ex. 191, R. 2834; Ex. 655, R. 2851). In this article Richmond stated, "In each strike . . . the enemy of the worker is . . . the capitalist, particularly the big monopoly section of capital that sets the tone and lays down policy of its entire class."[8]

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[8]The full text of this article is printed in Appendix B hereto, pp. xxi-xxiv, *infra*.

The record contains the following evidence of petitioner Richmond's membership in the Young Communist League and the Communist Party, and of his attendance at meetings of those organizations:

1. For three to four months during 1931 petitioner was "organizational secretary" of the Philadelphia Young Communist League (R. 5351-53). In 1938 he attended a state meeting of the California Young Communist League at which some 75 other persons were present (R. 5543). There is no evidence as to what occurred at this meeting.

2. Richmond was present at state conferences of the California Communist Party sometime after 1938 (R. 5543). There is no evidence of what was said at these conferences. Respondent's witness Saunders placed petitioner at district meetings of the California Communist Party between 1938 and sometime in 1939 or 1940 (R. 546). Saunders had previously testified that the *People's World* was discussed at district meetings which occurred during the same time period (R. 445-46).

3. Respondent's witness John Lautner testified that he saw petitioner Richmond at the 1945 convention at which the Communist Political Association was reconstituted as the Communist Party (R. 2038, 2504). That convention took place during July 26 to 28, 1945 (R. 2446; Ex. 42, p. 579, R. 581). A photostatic copy of Richmond's army discharge papers showed that he left the United States on June 22, 1944, en route to the European theater, and did not arrive back in the United States until August 11, 1945, some two weeks

after the conclusion of the 1945 convention (Ex. AY, R. 11,913-14).

4. One of respondent's witnesses testified that about two dozen meetings occurred at her home between December 1947 and about May 1949, and that Richmond, along with some 20 others, attended most of them (R. 5437-47). These meetings, so the witness was told by someone else, were "secret" meetings of the state and county board (R. 5438). There is no evidence concerning the content of these meetings.

5. Another witness for respondent, the superintendent of the building in San Francisco in which the Communist Party had its offices, said that many times petitioner rode the elevator to the floor on which those offices were located (R. 7765; 7796). She testified further that Richmond occasionally "came to the elevator and they [referring to persons in the Communist Party offices] would give me papers, notes to give to Al. . . ." This happened "fully a dozen" times (R. 7796). There was no evidence as to what the notes said.

6. In January 1951, at a regional convention of the Communist Party held in Oakland, petitioner was introduced as the editor of the *People's World*. He gave a talk, the substance of which was not stated (R. 3570-73).

The record contains no other evidence concerning petitioner Al Richmond.

C. Petitioner Philip Marshall Connelly.

The record contains the following evidence of petitioner Connelly's participation in activities not shown to have been Communist Party activities:

1. In June 1938 petitioner Connelly attended a convention of the American Newspaper Guild as a delegate from the Los Angeles local of the Guild (R. 1313-14). This convention, held in Toronto, Canada, was attended by some 200 delegates representing locals from all over the United States (R. 8314; 8319).

2. In 1938, during the Newspaper Guild strike, Connelly was one of a group of strikers who were picketing the *Hollywood Citizen News* (R. 3955). During the same year Connelly was seen at union meetings *(ibid.)*.

3. In 1943 petitioner participated in a "big demonstration . . . . from the City Hall steps to the Olympic Auditorium [in Los Angeles]" (R. 5560).[9]

4. In 1945 Connelly was present at a public choir festival at the Hollywood Bowl, attended also by about 15,000 other persons. At this time and place the witness Rosser asked petitioner why the Communist Party had sent out a letter attacking him (the witness). Connelly replied that Rosser should not talk to him about that matter but should take it up at Communist Party headquarters (R. 6454-55).

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[9]Further testimony showed that this was a demonstration for a second front and that about 9,000 people participated in it (R. 5560, 62); this testimony was struck by the Court (R. 10,058).

5. At an unspecified date Connelly attended a meeting at the CIO hall. This was not a Communist Party meeting (R. 3955).

The record contains the following evidence of petitioner Connelly's participation in newspaper work as a member of the Communist Party:

1. While petitioner was a delegate to the 1938 convention of the American Newspaper Guild, he attended four meetings composed of about 50 delegates who were also members of the Communist Party (R. 7733; 7736; 7738-40). The first of these meetings was opened by one Roy Hudson, who said that its purpose was to coordinate efforts so as to achieve the aims of the Communist Party (R. 7736-37). The witness recalled those "aims" as being "a resolution on the war in Spain" and "the election of a Guild executive board which would be controlled by the Communist Party" (R. 7737). The only other testimony as to the content of these meetings is that one Tim Buck, head of the Canadian Communist Party, was present at the last one.

2. In October 1942 Connelly attended a caucus in his office in the CIO building at which the participants, all members of the Communist Party, discussed ways of setting up union committees to sell the *People's World* among the members of their unions (R. 5557-60). These committees were to be composed both of communists and non-communists (R. 5559). The county committee of the Communist Party had set goals for the sale of *People's World* subscriptions to

union members, and the communists in various unions were trying to meet those goals (R. 5560).

3. Petitioner Connelly appears as Los Angeles editor on the masthead of the September 12, 1949 issue of the *People's World* (Ex. 749, p. 6, R. 11,599). In May or June of 1950 he was introduced to one of respondent's witnesses as "our editor for the *People's World*" (R. 6641). He continued to hold the position of Los Angeles editor at the time this case was tried (R. 11,323).

The record contains the following evidence of petitioner Connelly's association with and participation in the Communist Party other than as a newspaperman:

1. In June 1940 Connelly was present at a meeting of the county committee of the Los Angeles Communist Party (R. 5527-29). As to the content of this meeting, respondent's witness testified, "We discussed the . ... presidential election campaign, and the Communist campaign for Southern California, and discussed the slogans that would be used and how we could push the election campaign. . . . And the slogans that we discussed was [sic]: Don't support the imperialist war; vote Communist; vote for Browder and Ford. . . ." (R. 5528-29). Several months before Pearl Harbor, in March 1941, petitioner attended another county committee meeting (R. 5553). The discussion concerned efforts to organize sentiment against United States participation in the war, and petitioner stated that communists could do this effectively in the trade union movement (R. 5554-55).

2. In June 1941 Connelly spoke at a meeting of about 75 Communist Party members (R. 5555-57; 6162-63). He discussed the "need to mobilize support for the strike that was going on at North American, because the government had threatened to bring in soldiers to settle the strike, and the need for Communists to get together and mobilize the city and protest against the government's interference". (R. 5556-57).

3. In 1945 petitioner was introduced to one of respondent's witnesses as "an old party member" (R. 7827-29). On about six occasions between that time and the early part of 1948 he rode the elevator to the floor on which the offices of the California Communist Party were located (R. 7830).

4. Respondent's witness Litt testified that in March 1948 he attended a "functionaries" meeting (R. 4979). He said, "I believe the defendant Connelly was there, also. No, I would like to retract that. I wouldn't make a positive identification of him at that particular meeting" (R. 4981).

5. Connelly attended two meetings of the Tom Paine club of the Communist Party, one in April 1947 and the other in May 1947 (R. 7635). At the first meeting the members were discussing why they had joined the Communist Party, and, according to respondent's witness, petitioner stated that "the reason he was a member of the Communist Party was that it afforded him an opportunity for organization and direction in the struggle; it additionally afforded

the chance to develop leadership; and thirdly, enabled in this particular club, to organize and direct the policies of the union in which he was active" (R. 7637-38). The subject considered at the second meeting was "whether or not the Party would have to go underground" (R. 7640).[10]

6. In May 1946 petitioner was present at a meeting of about 150 persons in the Mayflower Auditorium in Los Angeles; this was "known as the Elizabeth Gurley Flynn meeting"; the witness did not recall whether petitioner participated in that meeting; what was said there was not stated (R. 3955-56). The same witness thought he had seen Connelly at some large meeting at the Shrine Auditorium (R. 3956).

7. At some unstated date one of respondent's witnesses attempted to collect Communist Party dues from petitioner, but never did, since petitioner was not at home (R. 6644-48).

The record contains no other evidence as to petitioner Philip Marshall Connelly.

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[10]In testifying about this meeting and what occurred there, the witness first said, "I don't believe I could recall exactly what that discussion was about. It was fairly general" (R. 7639). Two questions later, when respondent asked the witness specifically whether "the question of the Communist Party going underground" was discussed, the witness' memory returned (R. 7640).

The witness did not explain what "underground" meant or what its purpose was. Respondent's witness Lautner testified that the purpose of a so-called "underground" structure would be "to have an organization force that can fight its way back into legality . . . get back to a legal status" (R. 2565). Another of respondent's witnesses testified that Communist Party clubs were divided into smaller units because of fear of violence from private groups and harassment by government agencies (R. 4470-71). There is no testimony or other evidence that the purpose of "going underground" was to foment a violent revolution or to advocate such action.

D. The Daily People's World.

During the latter part of 1937 the Communist Party in California decided that the *Western Worker*, an official Party newspaper, should be abandoned, and that a new daily should be established (R. 440-444). This was the beginning of the *Daily People's World*. Its first issue appeared on January 1, 1938, and it has been in publication ever since.

Fifty-seven issues of the *Daily People's World* were introduced into evidence.[11] Their contents may be summarized as follows:

[11]Exhibit No.	Record Reference	Exhibit No.	Record Reference
AK	1883	GZ	6394
AL	1883	HA	6432
AM	1883	JN	10,349
AN	1883	JR	10,423
AO	1883	JS	10,434
AP	1883	KA	10,593
AQ	1883	KD	10,601
D	961	KE	10,601
DM	4095	KF	10,601
DN	4095	KH	10,616
DP	4095	MG	11,076
DS	4182	MH	11,076
DT	4223	MI	11,076
DX	4295	MJ	11,076
DY	4336	MQ	11,839
DZ	4336	MU	11,769
EZ	4893	MV	11,769
FA	4893	MW	11,769
FB	4893	MX	11,769
FC	4893	159	687
FD	4893	159A	5302
FE	4893	375	2873
FL	5106	707	5302
FM	5106	709	5302
GJ	6142-43	710	5304
GK	6142-43	714	5530
GL	6142-43	736A	8060
GM	6142-43	737	8070
GY	6378	749	11,599

In the above list the exhibits designated with letters were introduced by counsel for petitioners; the numbered exhibits were

1. There is no advocacy, express or implied, of violent overthrow of our Government.

2. Regularly included in the *People's World* were articles on sports (*e.g.*, Ex. 709, p. 11, R. 5302; Ex. 714, p. 4, R. 5530; Ex. BT, p. 4, R. 3189; Ex. HA, p. 4, R. 6432), daily radio schedules (*e.g.*, Ex. 736A, p. 10, R. 8060; Ex. 737, p. 10, R. 8070; Ex. BR, p. 10, R. 3168; Ex. BT, p. 5), reports of current music and art events (*e.g.*, Ex. 159A, p. 8, R. 5302; Ex. 709, p. 9; Ex. 710, p. 5, R. 5304; Ex. 749, p. 5, R. 11,599; Ex. AQ, p. 5, R. 1883; Ex. AN, p. 5, R. 1883; Ex. DZ, p. 5, R. 4336; Ex. FB, p. 5, R. 4893), and motion picture and book columns (Ex. 159, p. 5, R. 687; Ex. 710, p. 5; Ex. 714, p. 5; Ex. 737, p. 11; Ex. AP, p. 15, R. 1883; Ex. AQ, p. 5; Ex. DP, p. 5, R. 4095; Ex. FB, p. 5).

3. The paper endorsed and campaigned for such legislation as repeal of the Taft-Hartley Act (Ex. AQ, p. 6), passage of the Wagner-Dingell-Murray Health Bill (Ex. GK, p. 6, R. 6142), defeat of the Mundt-Nixon bill (Ex. AK, p. 1, R. 1883; Ex. AN, p. 6) and enactment of fair-employment-practices legislation (Ex. 159A, p. 1). Shortly before the convening of the California legislature in 1945, a "special legislative supplement" issue was published, in which various state laws were recommended (Ex. DX, R. 4295). The *People's World* also campaigned for changes in the San Francisco city charter (Ex. JN, pp. 3-4, R. 10,349).

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introduced by respondent. Exhibit MH and 710 are the same issue of the paper.

4. In both news stories and editorials the readers of the *People's World* were urged to vote at election time (Ex. DN, p. 1, R. 4095; Ex. AL, p. 1, R. 1883). Candidates were endorsed, including those of major parties (Ex. DM, p. 1, R. 4095).

5. The position of the *People's World* on foreign affairs during the years following World War II included: opposition to support of Francisco Franco, the "Fascist dictator" (Ex. 159A, p. 7); for recognition of Communist China and disavowal of Chiang Kai-shek (Ex. 736A, p. 7); opposition to United States participation in the Korean war (Ex. 375, R. 2873); opposition to the Marshall Plan (Ex. 737, p. 4); support for the administration of foreign aid through the United Nations (Ex. KA, p. 6, R. 10,593).

6. It was a prime policy of the paper to support and campaign for equal rights for minorities, especially the Negro (*e.g.*, Ex. 159A, pp. 3-4; Ex. 736A, § 2, p. 3; Ex. GL, p. 6, R. 6143). An equally strong policy was that of support for organized labor (*e.g.*, Ex. DZ, p. 1, R. 4336; Ex. 710, p. 1; Ex. DZ, p. 1).

The record contains the following evidence of Communist Party supervision over the content of the *Daily People's World:*

1. The *People's World* was discussed at district meetings of the Communist Party from the latter part of 1937 until about August 1945 (R. 441, 446, 457). Either the editor, assistant editor or business manager of the *People's World* was "invariably" present at these district meetings (R. 445).

2. When the district committee arrived at decisions on political matters, the *People's World* would soon carry an editorial or news story concerning that matter (R. 446-47). No specific instances of this were mentioned by the witness.

3. The pages of the *People's World* were open to non-communist writers, and the paper has published articles that did not "reflect the communist views" (R. 11,322). No specific instances of this were mentioned by the witness.

The record contains the following evidence of communist support for the *People's Daily World:*

1. The Communist Party undertook to raise funds for the *People's World* (R. 1565-66; 5461).

2. The paper was sold at "functionaries" meetings (R. 5010).

3. In the spring of 1950 two of the petitioners in case No. 6 were present at a *People's World* meeting; petitioners Richmond and Connelly were not identified as being present at that meeting (R. 2819-2820).

4. In the summer of 1950, at some election rally, petitioner Dobbs[12] spoke on "the circulation of the People's World"; petitioners were not identified as being present at this election rally (R. 2825-27). At another meeting of about 150 persons in March 1948 Dobbs spoke on the importance of supporting the

[12]The petitioners in cases Nos. 6 and 7 will be referred to herein simply as "petitioners" without designation of their case number.

People's World; he further stated that the paper, in addition to disseminating news, could "issue instructions to party workers"; neither Richmond nor Connelly were identified as being present at that meeting (R. 4979-89). At another meeting in March 1948, about 20 persons present, Dobbs said that those communists who were responsible for distribution of the *People's World* in their Party clubs should see to it that they would have means to continue this distribution even if it became illegal to do so; neither Richmond nor Connelly were identified as being present at this meeting (R. 5014-18).

5. During the late '40s the form used to apply for membership in the Communist Party had attached to it a card which could be used to subscribe to the *People's World* (R. 1553-55).

6. The position of "press director" is a "minor" office in Communist Party clubs (R. 6589). One of the duties of the press director was to organize discussions around articles and editorials from the *People's World.* (Ex. MF, p. 15, R. 11,056). The articles in the *People's World* were occasionally used as the basis for discussions of current events at Communist Party club meetings (R. 1299-1300).

The record contains the following evidence concerning use of the *People's Daily World* by the Communist Party in its activities among non-communists:

1. In June 1950 the *People's World* came out with an extra on the Korean War (Ex. 375, R. 2873). The Los Angeles Communist Party placed its own leaflet

inside this issue of the *People's World* and distributed the combination door-to-door (R. 2873).

2. In the spring of 1950 the State Committee of the California Communist Party issued a leaflet entitled "Plan of Action for Peace Month" (Ex. 199, R. 3560). In this leaflet it was urged that the *People's World* be utilized "in all the mass community activities around the peace issue" (Ex. 199, p. 2).

3. Distribution of the *People's World* was considered by the Communist Party to be one way of convincing the general public of the correctness of the communist position on current political issues (Ex. MF, p. 15, R. 11,056; Ex. 199, p. 2, R. 3560). The Communist Party also sought new members from among the non-communist readers of the *People's World* (Ex. MF, p. 15).

A few of the numerous documents which are in evidence contain a passage relating to the importance of *a* newspaper to the Communist Party. Although the substance of what is said in these exhibits is simply that a newspaper can be a powerful propaganda medium, and although there was *no showing that petitioners ever read the pertinent passages or were in any other way connected with them,* respondent has heretofore quoted these materials in arguing the case against petitioners. Consequently, we include them here. We shall not quote them in full, since it will be necessary to do so within the Argument section. The documents are as follows:

1. *The History of the Communist Party of the Soviet Union* contains a section entitled "The Bolshe-

vik Newspaper 'Pravda'—The Bolshevik Group in the Fourth State Duma" (Ex. 28, pp. 149-56, 159, R. 1362). This section was referred to by Dobbs at two meetings at which he spoke on the *People's World*. Dobbs "made an analogy . . . to the importance of the paper by recalling the effect and the value of newspapers during the time of the Russian revolution and the period immediately preceding it" (R. 4986). Also, when Dobbs mentioned the possibility of having to distribute the *People's World* in the face of prohibitory laws, he mentioned that Pravda had been circulated in Russia even when to do so was illegal (R. 5018).

2. A report delivered to a meeting of the Communist Party National Committee in 1946 contains several pages on newspapers (Ex. 2, pp. 810, 817-26, R. 1582). In this article the *Daily Worker* and its Sunday edition, *The Worker*, are referred to some 72 times; the *People's World* is referred to 7 times. The *People's World* is not referred to under the subsections "Steps to be Taken," "Objectives and Tasks," and "Financial Problems." This report states, "The first and main point to be established is that the *Daily Worker* is the official organ and spokesman of the Communist Party" (Ex. 2, p. 819).

3. A report delivered to a meeting of the Communist Party National Committee in December 1946 contains a short section on newspapers (Ex. 637, pp. 75-78, R. 4487). The *People's World* is mentioned once in this report, and that mention is by way of allusion to how the Communist Party in California goes about

seeing to it that its members renew their subscriptions to the *People's World* (Ex. 637, pp. 77-78).

4. Another of respondent's exhibits contains an article entitled "Twenty-five Years of the 'Daily Worker'" (Ex. 265, pp. 72-79, R. 6608). The *People's World* is not mentioned in this article.

5. Another of respondent's exhibits contains an article entitled "Make the Communist Press a Powerful Organ of Struggle" (Ex. 268, pp. 168-75, R. 7524). The *People's World* is not mentioned in this article.

6. From the 1938 resolutions of the Communist Party respondent has quoted a passage which states that the *Daily Worker, The Worker* and the *Daily People's World* are vital to the realization of "the present objectives and historic aims of the working class movement" (Ex. J, pp. 17-18, R. 1248).

7. Finally, two passages from *The Communist International* by Lenin concerning the importance of newspapers as propaganda media are quoted by respondent (Ex. 514, pp. 174, 202, R. 3815).

E. Matters as to Which There Was No Evidence.

There is no evidence in the record of this case that either petitioner Richmond or petitioner Connelly ever expressly advocated violent overthrow of our Government. There is no evidence that either of them ever said anything construable as advocacy of violent overthrow. Putting aside the question whether the doctrines of Marxism-Leninism are in any sense equatable with advocacy of force and violence, there is no evidence connecting either petitioner with the study,

teaching or advocacy of Marxism-Leninism. There is no evidence in this case that either petitioner was present at any meeting where anyone else expressly advocated forceful overthrow of the Government, or said anything interpretable as so advocating, or taught, studied or advocated the doctrines of Marxism-Leninism.

There is no evidence that the *Daily People's World*, the newspaper with which petitioners were connected, ever contained one word, either express or implied, advocating violent revolution.

SUMMARY OF ARGUMENT.

I. The evidence is insufficient to show (a) that petitioners participated in the alleged conspiratorial agreement, or (b) that petitioners intended to cause the voilent overthrow of the Government as speedily as circumstances would permit. The testimony presented by respondent showed that petitioners were members of the Communist Party, attended various of its meetings, participated in some of its activities, made miscellaneous written and oral statements, and edited the *Daily People's World*. There is no testimony that petitioners ever expressly or impliedly advocated violent revolution. There is no such advocacy in the newspaper they edited. Only by engaging in a series of tenuous and wholly speculative inferences could a jury ever conclude from such testimony that petitioners were guilty as charged. For each inference essential to a conclusion of guilt there is an equally

probable, often more probable, inference which conflicts with guilt and is consistent with innocence. Testimony of such an ambiguous nature does not constitute "substantial" evidence of "guilt beyond a reasonable doubt." Moreover, the reasoning necessary to a conclusion of guilt involves a series of inferences, each based upon a prior inference rather than upon a fact established by direct testimony. Convictions based on such highly speculative reasoning are not supported by sufficient evidence.

Participation In The Conspiratorial Agreement. The evidence concerning meetings at which petitioners and alleged co-conspirators were jointly present is of two types. First there is testimony that petitioners attended a meeting but nothing as to what was said or done there. Since the very witnesses who testified concerning these meetings had attended them, and thus knew fully what happened there, the most reasonable inference is that nothing occurred which would prove the charge against petitioners. Certainly the opposite inference is completely untenable. Second, there is testimony of meetings attended by petitioners and of what was said or done there. Nothing even remotely connected with the supposed conspiracy occurred.

The verbal and written statements of petitioners are in no way related to advocacy of violent revolution. For the most part these statements are no more nor less than the expression of views on the political issues of the day. In addition there is testimony that petitioner Richmond spoke of a "Marxist and Leninist

approach" to the *Daily People's World*. The only evidence as to what petitioner meant by those words is to be found in the newspaper itself. The content of that newspaper proves quite the opposite of participation in the alleged conspiracy. As to petitioner Connelly, there is evidence that he was present at a Communist Party club meeting at which the question "whether the Communist Party would have to go underground" was discussed. There is no evidence of petitioner's views on the subject. There is no evidence that the so-called "underground" indicates the existence of the alleged conspiracy, or that agreement with the idea of an "underground" shows participation in the alleged conspiracy.

Petitioners' editorship of the *Daily People's World* —a newspaper supported, used and substantially controlled by the Communist Party—shows that petitioners supported the Communist Party. The question in this case, however, is whether petitioners supported the Communist Party *as an instrument for the advocacy of violent revolution.* The fact of editorship does not in itself show such a purpose. None of the facts concerning the way in which the Communist Party supported, used or controlled the newspaper show such a purpose. Nor are any of these facts such as would indicate the existence of the alleged conspiracy.

The fact that petitioners acted, spoke and wrote *as members of the Communist Party* fails to prove participation in the supposed conspiracy. Respondent's theory is that there was a conspiratorial group

within the Communist Party, which group, as a part of its conspiracy, had agreed to teach "Marxism-Leninism"; that such teaching is *per se* the advocacy of forcible overthrow; and that persons such as petitioners must have known that "Marxism-Leninism" constituted such advocacy. This theory is contrary to law. *Schneiderman v. United States*, 320 U.S. 118 (1943). This theory is contrary to plain common sense and conflicts with all we know about the problems of semantics. The doctrines called "Marxism-Leninism," after all, constitute an entire philosophy, covering various aspects of human knowledge and activity. No philosophy in history has ever been uniformly interpreted, even by its adherents. Respondent's theory is contradicted by the testimony of respondent's own witnesses, testimony which shows that members of the Communist Party disagreed and had conflicting ideas on the correct interpretation of "Marxism-Leninism." There is no testimony concerning the way in which petitioners interpreted "Marxism-Leninism," and certainly it can not be *assumed* that their interpretation involved violent overthrow of the Government.

Intent. The evidence is insufficient to prove intent for the same reasons as it is insufficient to show participation in the alleged conspiracy. But even assuming that participation were proven, to deduce from this inferred participation that petitioners possessed the proscribed intent would stretch the testimony beyond the breaking point of "substantiality." Many men might agree to advocate violent revolution, but

wish no part of the violence themselves. Assuming that it is possible to infer from the testimony that petitioners agreed to the proscribed *advocacy,* there is no testimony from which it could be inferred that petitioners personally intended to cause a violent overthrow of the Government.

Most important, in respect to the issue of intent, there is no evidence to indicate that petitioners intended to cause violent revolution *as speedily as circumstances would permit.* In *Dennis v. United States,* 341 U.S. 494, this Court held that the Smith Act, *as interpreted,* did not violate the clear-and-present-danger test. Under that interpretation, possession of an intent to overthrow the Government "as speedily as circumstances would permit" was an essential part of the "clear and present danger." An intent to cause forcible overthrow at some indefinite time in the remote future can not satisfy the test of the *Dennis* case. If such an intent were sufficient, then the phrase "as speedily as circumstances would permit" would be meaningless surplusage: It would have been sufficient for this Court to have said simply that a defendant must have intended to overthrow the Government. If, contrary to reason and law, it be assumed that all other aspects of the charge against petitioners were proven, there still would be no evidence to show that they intended to cause violent overthrow other than at some indefinite, distant, remote future time. Petitioners spoke and acted to achieve social reforms through the democratic process. These efforts to achieve social reform are inconsistent with the notion

that petitioners sought to create conditions for a violent revolution. If they intended such a revolution, the intent had no orientation in time and certainly was not directed toward accomplishment as quickly as possible.

2. Conviction of petitioners on the evidence adduced violates the First Amendment guarantees of free press, speech and assembly. The practical effect of a ruling that the evidence against petitioners is sufficient is to prohibit others from engaging in the activities which the testimony shows petitioners to have engaged in. Under such a ruling these activities are enough for a jury to infer guilt. Thus one who would escape petitioners' fate must refrain from acting as they did. Whether such a ruling is consistent with the First Amendment depends upon a balancing of interests.

On the one hand there is society's interest in preserving the freedom to speak, write and publish as petitioners did. The value of this interest cannot be over stated. This is because petitioners were challenging some of the basic hypotheses upon which our actions as a nation, nationally and internationally, were based. Freedom to discuss this type of issue is of the utmost importance to a free society. Only if such essential problems can be openly debated can there be any assurance that the assumptions upon which we act are true.

On the other hand, society has a vital interest in preventing conspiracies to advocate violent revolution. The weight of this interest, however, is a variable. Ob-

viously, if the evidence showed only that a man advocated trade unionism, society would have no interest in the promulgation of a rule of law under which he could be convicted of conspiracy to violate the Smith Act. There simply would be no significant likehood that this man was such a conspirator. In the case before us the evidence shows that petitioners engaged in lawful writing, speech and assembly; that is all. The inferences by which such testimony is converted into proof of the offense charged are dubious at best. Thus it is unlikely that society's interest in preventing conspiracies to violate the Smith Act would be served by a prohibition of such activities. Considering this, and considering the importance of preserving freedom to discuss fundamental beliefs and ideas, conviction of petitioners—prohibition of their activities—violates the First Amendment.

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICTS AGAINST PETITIONERS.

Like most crimes, the offense with which these petitioners were charged involves both an objective and a subjective element. It was incumbent upon respondent to prove first that petitioners agreed with the alleged co-conspirators to advocate the forcible overthrow of our Government and to organize the Communist Party as a medium for that advocacy. Second, it was necessary to show that petitioners, in

so agreeing, specifically intended to bring about violent overthrow as speedily as circumstances would permit. The question, then is whether, under the criteria of sufficiency generally applicable in criminal cases, the evidence adduced at this trial suffices as proof of both the act and intent which together constitute the crime with which petitioners were charged.

A. The Criteria of Sufficiency.

Whether the evidence was sufficient to support the verdicts against petitioners depends upon whether the record contained any substantial evidence of guilt beyond a reasonable doubt. The evidence was wholly circumstantial. No witness testified that he observed the formation of a conspiracy, and of course there was no direct evidence of state of mind. The jury was asked to infer that petitioners had agreed as charged and that they had the requisite specific intent. This is quite unobjectionable. Circumstantial evidence, if sufficient, is as satisfactory as direct evidence. However, the evaluation of the sufficiency of circumstantial evidence involves problems not present when the evidence is direct. These problems and the approach to their solution will be briefly considered before passing to an analysis of the evidence concerning petitioners.

The sufficiency of a proof, direct or circumstantial, depends in the first instance upon the force of the *testimony* upon which the proof is based. Suppose, for example, that *X* is being prosecuted for murder. Testimony that *X* was seen stabbing the victim would

constitute direct evidence. Testimony that the victim was killed at a certain time and place and that *X* was seen leaving that place at about the time of the murder would be circumstantial evidence. The first step in evaluating the sufficiency of either piece of evidence is to determine whether it is probable that what the witness reported corresponds to what actually occurred. If the direct evidence is found to be probable, the inquiry into its sufficiency is completed. However, in respect to the circumstantial evidence, the conclusion that the testimony probably is true does not end the inquiry. The *validity of the inference* to be drawn from that testimony must be considered. The fact that *X* was seen leaving the scene of the crime provides a basis for inferring that he committed the murder. But other inferences also are possible. Consequently, in assessing the sufficiency of circumstantial evidence, a reviewing court must consider not only whether the actual testimony possesses a sufficient probability of truth but also whether the inferences to be drawn from that testimony are sufficiently probable.

That circumstantial evidence presented such a problem was recognized at an early date.[12a] This recogni-

[12a] The early writers stated that in a criminal case circumstantial evidence would suffice only if it excluded all reasonable hypotheses but that of guilt. See, *e.g.*, 1 STARKIE, EVIDENCE *506 (1826); 3 GREENLEAF, EVIDENCE, 32-33 (2d ed. 1853), WILLS, CIRCUMSTANTIAL EVIDENCE *149 (Amer. ed. 1857); BURILL, CIRCUMSTANTIAL EVIDENCE 737-38 (1868). The same rule was stated by those who wrote at the end of the nineteenth and the beginning of the twentieth century. See GILLETT, INDIRECT AND COLLATERAL EVIDENCE 68 (1897); 3 ENCYCLOPEDIA OF EVIDENCE 92. (1904); HAMMON, EVIDENCE 23 (1907); 1 MOORE, TREATISE ON FACTS 600 (1908).

tion was first manifested in the formulation of a jury instruction.[13] Then came tests to be applied by an appellate court. Today most of the Federal Courts of Appeal apply this test: The circumstances must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence; if the circumstances are consistent with a reasonable hypothesis of innocence, then the trial court should have directed a verdict of acquittal.[14] The formulation followed in

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[13]The earliest decision appears to have an English one. *Hodge's Case*, 168 Eng. Rep. 1136 (1838). In that case the Court charged the jury that the circumstances must be inconsistent with any rational conclusion but guilt in order to justify a verdict of guilty. The same charge appears in early cases in this country. *E.g.*, United States v. Babcock, 24 Fed. Cas. 913, No. 14,487 (E.D.Mo. 1876). Substantially the same charge is generally given to modern day juries. It was given in the instant case (Instruction No. 4, R. 13,730-31). Whether such an instruction clarifies or confuses the issues for a jury is questionable. It was for that reason that this Court recently held that it was not error to refuse such an instruction. *Holland v. United States*, 348 U.S. 121 (1954). Indeed, it seems apparent that the jury in the instant case paid no attention to the instruction or else failed to understand the import of it. Of course, it is precisely because juries may make such errors that appellate courts will carefully scrutinize the evidence, especially circumstantial evidence, to determine its sufficiency.

[14]Third Circuit: *United States v. Laffman*, 152 F.2d 393 (1945); *United States v. Tatcher*, 131 F.2d 1002 (1942); *United States v. Russo*, 123 F.2d 420 (1941); *Wiener v. United States*, 282 Fed. 799 (1922). Other decisions in the Third Circuit have held that there must be "substantial" evidence excluding all reasonable conclusions but that of guilt. Two of these involved a charge of conspiracy. *McLaughlin v. United States*, 26 F.2d 1 (1928); *Ridenour v. United States*, 14 F.2d 888 (1926).

Fifth Circuit: *Vick v. United States*, 216 F.2d 228 (1954); *McTyre v. United States*, 213 F.2d 65 (1954); *Rent v. United States*, 209 F.2d 893 (1954); *Bryan v. United States*, 175 F.2d 223 (1949); *Garrison v. United States*, 163 F.2d 874 (1947); *Strickland v. United States*, 155 F.2d 167 (1946); *Hubby v. United States*, 150 F.2d 165 (1945); *Kassin v. United States*, 87 F.2d 183 (1937); *Tomplain v. United States*, 42 F.2d 205 (1930);

the Ninth Circuit, nowhere mentioned in the opinion in this case, is this: If reasonable minds must agree that the circumstances permit a reasonable inference of innocence, it is error to submit the case to the jury.[15] The First Circuit and the English and Ca-

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De Luca v. United States, 298 Fed. 412 (1924); *Sherman v. United States*, 268 Fed. 516 (1920).

Sixth Circuit: *Dawes v. United States*, 177 F.2d 255 (1949); *Epstein v. United States*, 174 F.2d 754, 769 (1949); *Tucker v. United States*, 224 Fed. 833 (1919) (dictum).

Seventh Circuit: *United States v. Fenwick*, 177 F.2d 488 (1949).

Eighth Circuit: *Wesson v. United States*, 172 F.2d 931 (1949); *Langer v. United States*, 76 F.2d 817 (1935); *Philyaw v. United States*, 29 F.2d 225 (1928); *Vernon v. United States*, 146 Fed. 121 (1906). In several other cases the Court has held that there must be "substantial" evidence precluding a reasonable hypothesis of innocence. *E.g., Salinger v. United States*, 23 F.2d 48 (1927).

Tenth Circuit: *Sapir v. United States*, 216 F.2d 722 (1954); *Morgan v. United States*, 159 F.2d 85 (1947).

District of Columbia Circuit: Until 1947 the "reasonable hypothesis" rule was consistently followed. *E.g., Hammond v. United States*, 127 F.2d 752 (1942). In that year it was expressly repudiated in a decision which did not refer expressly to situations in which *all* the evidence is circumstantial. *Curley v. United States*, 160 F.2d 229 (1947). The *Curley* case was followed in *McGuire v. United States*, 171 F.2d 136 (1948). However, in the latest decision the Court has held that if the evidence is wholly circumstantial, then it is insufficient unless it excludes every reasonable hypothesis of innocence. *Maryland & Virginia Milk Producers Ass'n v. United States*, 193 F.2d 907 (1951). The *Maryland & Virginia* case was cited and followed in *United States v. Kelly*, 119 F. Supp. 217, 221 (D.C. 1954).

The "reasonable hypothesis" rule has been followed in cases decided under Federal Rule of Criminal Procedure 29(b). *Vick v. United States, supra; United States v. Maghinang*, 111 F. Supp. 760 (D. Del. 1953); *United States v. Gasomiser Corp.*, 7 F.R.D. 712 (D. Del. 1947).

Apparently the rule is not followed in the Second Circuit. It was followed in two early cases. *Romano v. United States*, 9 F.2d 522 (1925); *Nosowitz v. United States*, 282 Fed. 575 (1922). But it has not appeared since.

[15] *Schino v. United States*, 209 F.2d 67 (1953) (decided under Rule 29(b)); *Remmer v. United States*, 205 F.2d 277 (1953), *rev'd on other grounds*, 347 U.S. 227 (1954).

nadian courts state that a conviction must be reversed if the circumstances are equally consistent with both innocence and guilt.[16]

Each of these formulae, despite their apparent differences, have two important points in common. First, they are not something separate and apart from the "substantial evidence" rule. They are simply the expression of that rule in its specific application to verdicts based on circumstantial evidence. Thus, if reasonable minds must agree that the circumstances are subject to a reasonable explanation consistent with the defendant's innocence, the jury hardly could have found guilt beyond a reasonable doubt. And certainly no verdict of guilt could be sustained if the circumstances proven were equally consistent with innocence.

Second, these so-called "rules" are important not as mechanical tests but as a method for approaching

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[16]First Circuit: *Roukous v. United States*, 195 Fed. 353 (1912); *Yoffe v. United States*, 153 F.2d 571 (1946) (dictum).

England: *Rex v. Carter*, 23 Cr. App. Rep. 101 (1931); *Rex v. Bookbinder*, 23 Cr. App. Rep. 59 (1931); *Harries v. Thomas*, 86 L.J.K.B. 812 (1917).

Canada: *Regina v. McKay*, 107 Can. Crim. Cas. 304 (Sup. Ct. 1953); *Rex v. McEwan*, [1932] 3 W.W.R. 564, 570 (Alb. Sup. Ct.) (dictum); *Rex v. Tymko*, 42 Can. Crim. Cas. 147 (Alb. Sup. Ct. 1924); *Rex v. Carey*, [1945] 3 W.W.R. 508 (B.C. Ct. App.); *Rex v. Dawley*, [1943] D.L.R. 401 (B.C. Ct. App.); *Rex. v. Vinegratsky*, 60 Can. Crim. Cas. 258 (Manitoba Ct. App. 1933); *Rex v. Yok Yuen*, [1930] 1 D.L.R. 716 (Ont. Sup. Ct. 1929); *Rex v. Demetrio*, 59 Ont. L.R. 249 (Sup. Ct. 1926); *Rex v. McGrath*, [1946] 1 W.W.R. 59 (Sask. Ct. App. 1945). See also, *The King v. Horry*, [1952] N.Z.L.R. 111, 122 (Ct. App. 1951) (dictum).

For recent discussion of the problem of appellate review of criminal convictions based on circumstanial evidence see, 55 COL. L. REV. 549 (1955); 38 GEO. L.J. 285 (1950); [1948] WIS. L. REV. 93.

the problem. They focus attention on and sharply define the critical issue: Do the circumstances established by the evidence make it sufficiently probable that the inferences necessary to the verdict are true. Whether the criterion of sufficient probability be "inconsistent with innocence" or "more consistent with guilt than innocence" is of little consequence. The rules must be applied, and in the application the variations of wording are unlikely to make much difference.

Consequently we do not urge this Court to expressly adopt any particular form of the rule. We do urge the Court to adopt the methodology implicit in all the formulations: evaluate the probability of the inferences which the jury must have made in finding that petitioners were guilty as charged. This is an approach with deep historical roots, an approach which for decades has been a safeguard against convictions based on *possible* inferences from *equivocal* circumstances. We are not concerned with what criterion the Court may employ in determining whether an inference is sufficiently probable. We think that the circumstances proven in this case, if not inconsistent with guilt, at least are equally consistent with innocence. If so, under no test yet enunciated would the evidence be considered "substantial."

A second principle which the Court may wish to consider is the rule that an inference can be predicated only upon a fact which was established by direct evidence. *E.g., Pennsylvania R.R. v. Chamberlain,* 288 U.S. 333 (1933); *Sapir v. United States,* 216

F.2d 722 (10th Cir. 1954); *Wesson v. United States*, 172 F.2d 931 (8th Cir. 1949); *United States v. Russo*, 123 F.2d 420 (3rd Cir. 1941); *Simon v. United States*, 78 F.2d 454 (6th Cir. 1935).[17] How rigidly this principle should be applied may be open to question. But once again the underlying rationale is more important than the black-letter rule. That rationale is closely related to the basic approach discussed above. Different and often conflicting inferences can be based on the same proven fact. Because of this there is a certain possibility that any particular inference is erroneous. If an ultimate conclusion is predicated upon a string of inferences, the possibilities of error are multiplied.[18] Since the sufficiency of circumstantial evidence depends on the probability of the inferences necessary to the verdict, it is important to determine whether the necessary inferences are based on direct evidence or on other inferences.

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[17]One of the earliest statements of this principle appears in a work by Jeremy Bentham:

> "As every part of circumstantial evidence is a fact intended to be the groundwork of an induction, this fact ought to be proved as completely and regularly as if it were itself the subject of the investigation." BENTHAM, JUDICIAL EVIDENCE 186 note (1825).
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> "Since circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist, the process is fatally vicious and defective if the circumstances from which it is sought to deduce the conclusion depend also upon conjecture and speculation." MOORE, *op. cit. supra* note 12, at 600.

[18]Thus, if the directly proven fact is *a*, and *b* is one of two possible inferences from *a*, the conclusion that *b* is true is subject to one possibility of error. If *b* is now used as the basis for a further inference, *c*, and *c* is one of two possible inferences from *b*, the possibility of error is doubled: the conclusion that *a* proves *b* may be wrong, and the conclusion that *b* proves *c* may be wrong.

In examining the evidentiary theory of respondent's case, the Court will find various instances in which inferences, indeed a string of inferences, constitute the basis for conclusions necessary to the jury's verdict. This in itself, we think, establishes that the evidence was unsubstantial and insufficient.

We turn now to an analysis of the evidence, first the evidence relating to the issue of participation in the alleged conspiracy, and second the evidence pertinent to the issue of intent.

B. The Evidence Concerning Participation in the Alleged Conspiratorial Agreement.

1. *The Issue.*

The indictment in this case charges that the defendants, including petitioners, conspired to advocate violent overthrow of our Government and to organize the Communist Party as a society which would so advocate. However, it is not the Communist Party itself which is supposed to constitute the conspiracy, but rather an elite group within the Communist Party, which group allegedly conspired to use the Communist Party as a means for advocating force and violence.

Petitioners have never denied that they were members of the Communist Party and participated in some of its activities. Petitioners have continuously and clearly denied that they ever were a part of the supposed conspiratorial group. The issue, then, is whether it can be inferred from proof of petitioners' membership and activity in the Communist Party

that they were members of the charged conspiracy, the alleged elite group *within* the Communist Party.

There is no substantial evidence from which it could be directly inferred that any of the alleged conspirators agreed to advocate forcible overthrow of the Government. There is evidence which would permit an inference that some of the defendants agreed to teach "Marxism-Leninism." It is this inferred agreement to teach "Marxism-Leninism" upon which respondent has consistently relied as proof of the alleged conspiracy to advocate violent revolution. However, proof of an agreement to advocate "Marxism-Leninism" would not suffice as evidence of the alleged conspiracy. It would be necessary to show that the agreement to teach "Marxism-Leninism" involved a further understanding, namely an agreement that the doctrines denominated "Marxism-Leninism" be interpreted as calling for the violent overthrow of the Government of the United States.[19]

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[19] In *Schneiderman v. United States*, 320 U.S. 118, 155-57 (1943), this Court reviewed various of the books included within "Marxism-Leninism," the same books relied on by respondent here, and then stated, at page 157:

> "A tenable conclusion from the foregoing is that the Party . . . desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained power in a peaceful manner. . . ."

The Court carefully pointed out that it was not deciding what the program of the Communist Party was. All that was decided was that if the program was to be gleaned from the books introduced by respondent, there and here, then the program was ambiguous because those books were ambiguous. This problem is discussed at greater length herein at pages 82-91, *infra*.

Consequently in examining the evidence concerning petitioners to see whether it constitutes substantial proof of participation in the alleged conspiracy, two questions must be asked: Do the facts concerning Richmond and Connelly constitute sufficient evidence that they agreed to advocate "Marxism-Leninism"? Are those facts sufficient to prove that petitioners agreed that "Marxism-Leninism" be interpreted as requiring the use of force in the acquisition of governmental power in the United States?

For purposes of analysis the evidence has been divided into four parts: contacts between petitioners and alleged co-conspirators; written or oral statements attributable to petitioners; petitioners' activities on the *Daily People's World;* the fact that petitioners acted as members of the Communist Party.

2. *Contacts Between Petitioners and Alleged Co-Conspirators.*

It is common in conspiracy cases to introduce evidence of meetings and other contacts between the alleged conspirators. The theory upon which such evidence is posited as proof of the conspiracy and whether that theory is applicable here will be considered later. First the evidence of relations between petitioners and the alleged co-conspirators will be examined.

Contacts Between Petitioner Richmond and Alleged Co-conspirators.[20] Petitioner Richmond attended three

[20]The evidence considered in this subsection does not include evidence of meetings attended by petitioner at which no alleged

conventions at which alleged co-conspirators were present. The first, held in 1938, was a state meeting of the Young Communist League; some 75 persons were there, including petitioners Dobbs and Carlson (R. 5543). The second, held in 1950, was a local Communist Party convention; petitioner Lima was among the 20 persons present; Richmond spoke briefly on recruiting (R. 3562, 3568-70). At the third, another local convention, petitioners Lima and Schneiderman were among the 40 to 50 people in attendance (R. 3570-72).

Between late 1937 and sometime in 1939 or 1940 petitioner attended some district meetings (R. 546). We know the details of one such meeting: petitioners Yates and Schneiderman were present and the subject under consideration was the establishment of the *Daily People's World* (R. 440-42). As to the other district meetings held during this period, we know neither the persons present at those attended by Richmond nor the matters discussed nor the specific ones he actually went to. We do know that the *Daily People's World* was considered at many of these gatherings and that petitioner Richmond was managing editor of that newspaper during those particular years (R. 445-46, 546).

Petitioner also attended most of a series of so-called "secret" meetings of the state and county board. These occurred between December 1947 and May 1949 and were attended by about 20 people, including 5 to 7

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co-conspirators were present. Such meetings are considered in sections which follow.

alleged co-conspirators. They were held at the home of the witness who testified concerning them, and she was present in her home while they were taking place (R. 5437-49). Her testimony, however, leaves us ignorant of what was discussed.

Finally there is evidence of *possible* contacts between petitioner Richmond and alleged co-conspirators. Thus on various unspecified dates he entered a building in San Francisco and rode the elevator to the floor on which Communist Party headquarters were located (R. 7796). The elevator operator, who had joined the Communist Party at the request of the FBI, so testified. She also testified that on about a dozen occasions unspecified persons in those offices gave her notes which she delivered to Richmond (R. 7796). Petitioner also attended state conferences sometime after 1938 (R. 5543).[21]

Contacts Between Petitioner Connelly and Alleged Co-conspirators.[22] In June 1940 petitioner Connelly attended a meeting of the county committee of the Los Angeles Communist Party; 15 persons were present, including petitioner Steinberg and alleged co-conspirator Pettis Perry (R. 5527-29). At another county committee meeting, this one in March 1941, petitioner Connelly and alleged conspirator Perry were among

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[21]There was no testimony specifically stating that petitioner and some alleged co-conspirator were jointly present at these conferences. However it is likely that such joint presence occurred. This assumption, absent other evidence, would seem to prove nothing.

[22]The evidence considered in this subsection does not include meetings attended by petitioner at which no alleged co-conspirators were present. Such meetings are considered in sections which follow.

the 14 people in attendance (R. 5553). Connelly and Perry were both present at another meeting in 1941; total attendance at this one was about 75 (R. 5555-56). In 1947 petitioner went to two Communist Party club meetings; petitioner Healy was one of the other 8 to 10 persons present (R. 7635-40).

In addition to the above, petitioner Connelly, like petitioner Richmond, entered a building and took the elevator to the floor on which Communist Party headquarters were situated (R. 7830).

Legal Significance of the Evidence of Contacts Between Petitioners and Alleged Co-conspirators. Evidence of contacts between supposed conspirators is significant as proof of an opportunity to conspire, that is, as proof of a time and place at which an agreement, express or tacit, could have occurred. Proof of opportunity, however, is not proof of agreement.[23] Other evidence must be added. If it is shown that the alleged conspiratorial objective was discussed in the joint presence of the alleged conspirators, it is possible to infer their concurrence in that objective.

Thus respondent might have shown that the advocacy of violent revolution was expressly discussed at meetings attended by petitioners and the alleged co-conspirators. Absent such evidence, respondent might have presented testimony to the effect that the teach-

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[23] "Presumptions of guilt are not lightly to be induged from mere meetings." *United States v. Di Re*, 332 U.S. 581, 593 (1948). "[C]harges of conspiracy are not to be made out by piling inference upon inference. . . ." *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

ing of "Marxism-Leninism" was considered at such meetings and that petitioners understood "Marxism-Leninism" as a doctrine calling for the forcible overthrow of our Government. The plain fact, however, is that there is neither direct evidence nor evidence from which it could be inferred that either "Marxism-Leninism" or violent revolution ever were discussed between petitioners and the supposed co-conspirators.

For the most part the record is silent as to what occurred at the meetings attended by petitioner Richmond. This being so, there is of course a possibility that advocacy of "Marxism-Leninism" or of violent revolution were considered. However close scrutiny of the testimony indicates that no jury could reasonably have inferred that such a discussion actually occurred.

Consider, for example, the testimony that Richmond took elevator rides and received notes. This evidence is valueless unless it is first inferred that the testimony shows some contact between Richmond and an alleged co-conspirator. Such an inference, however, is no more likely to be true than is the opposite conclusion. Even if we accept the inference that some contact occurred, there is no way of knowing the content of that contact. A conclusion that the content was related to the supposed conspiracy would be the grossest kind of guess.

As to the meetings which Richmond attended, there is no evidence to connect any of them with the supposed conspiracy. The very composition of at least three of these gatherings makes such a connec-

tion highly unlikely: at the Young Communist League convention there were only two alleged co-conspirators among the 75 persons present; at the two local Communist Party conventions the ratio of supposed co-conspirators to others was 1 to 20. The "secret" board meetings of 1947-1949 were attended by a more select group and this may be true also of the district meetings. However, though the group may have been "select", the large majority of those present were not alleged co-conspirators. The fact is that these were Communist Party functions, and there is no evidence to justify an inference that advocacy of either forcible overthrow or of "Marxism-Leninism" were more likely than not to be discussed at such functions. The record shows that the Communist Party was concerned with and considered numerous international, national and local problems. These, as well as dozens of other things, might have been talked about at any meeting. Thus, to infer that illegal advocacy was discussed would be to engage in pure speculation. If the inference were made, it then would have to become the foundation for the pertinent conclusion: that petitioner Richmond because he was present during the hypothetical discussion impliedly agreed to the advocacy of violent revolution. Only in the Wonderland of Alice could such rank guesswork constitute substantial evidence.[24]

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[24] In *Hartzel v. United States*, 322 U.S. 680 (1944), the evidence showed that the petitioner had written articles attacking the war as a betrayal of America, condemning the President and denouncing our allies and the Jews; he mailed these articles to various persons and groups, including the United States Infantry Association, an organization which published the *Infantry Journal*,

Indeed, if the evidence justifies any inference as to the content of these meetings, it is an inference that there was no discussion of either "Marxism-Leninism" or violent revolution. The very witnesses who testified to petitioner's presence at these meetings were in attendance themselves. The *"secret"* board meetings were held in the home of the witness who testified concerning them and she stood at the door and greeted the participants as they arrived. Each of these witnesses remembered and testified to various details concerning the meetings, yet none of them ever reported any statements even remotely related to the revolution or violence or "Marxism-Leninism". It seems reasonable to suppose that if any such discussion had occurred, the witnesses would have so testified. From the absence of such testimony it can be inferred that there was no such discussion to report.

As to the meetings attended by petitioner Connelly, all five of them, they hardly suffice even as evidence of an opportunity to conspire. Only three alleged co-conspirators were present at any of these meetings, and never more than two at any one meeting. Two of the gatherings were ordinary Communist Party club meetings. The highest organizational body in-

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a magazine read by the armed services. This Court held the evidence insufficient to show that petitioner intended to cause insubordination, disloyalty or refusal of duty in the military forces. In the instant case there is no testimony to establish even a connection between petitioners and the idea of advocacy of violent revolution. Certainly, then, the evidence is insufficient to show any agreement by petitioners in respect to such advocacy. Agreement, after all, involves a state of mind. If the evidence was insufficient in *Hartzel*, it is doubly insufficient here.

volved was a county committee. Most important, however, is the fact that we know what was discussed at every one of these meetings. Respondent's witnesses were asked and they answered. Nowhere in the answers is there any mention of a statement or discussion concerning "Marxism-Leninism" or force and violence or any connected subject. Thus the evidence shows affirmatively that petitioner Connelly's attendance at these meetings cannot be the basis for an inference that he agreed with the objective of the alleged conspiracy.

Thus far the analysis of the evidence of contacts between petitioners and alleged co-conspirators yields this conclusion: The theory that an agreement can be inferred from joint presence during the discussion of the supposed conspiratorial objective is inapplicable here; there simply is no evidence that petitioners were present during any such discussion. However, the proof of meetings could have significance within the context of a different evidentiary theory. This theory, stated abstractly, is that an agreement can be inferred from proof of meetings plus proof that the alleged conspirators, acting separately, did what it is charged they conspired to do.

Thus if respondent had shown that petitioners were in some way connected with the teaching of "Marxism-Leninism", it might be permissible to infer that their conduct stemmed from an agreement with alleged co-conspirators. However there is no evidence in the record to show that either Richmond or Connelly participated in the teaching of "Marxism-

Leninism". Moreover, there is no evidence from which such participation could be inferred.[25]

Thus the fact that petitioners attended meetings with alleged co-conspirators proves simply that petitioners attended those meetings. It is a bare fact, unsupplemented by other relevant evidence, and incapable of supporting an inference that petitioners ever agreed, expressly or impliedly, to the advocacy of violent revolution.

We turn now to an analysis of the written and oral statements attributable to petitioners Richmond or Connelly. Statements there are. But as proof that petitioners joined the supposed conspiracy, this evidence is as insufficient as the evidence of the meetings.

3. Statements Attributable to Petitioner Richmond.

During the course of this case respondent has pointed to four written statements of petitioner Richmond, presumably on the assumption that they in some way prove the case against him.[26]

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[25]Of course, the crime of conspiracy can be shown to have been committed without proving accomplishment of the conspiratorial objective. Respondent's failure to prove that petitioners engaged in illegal advocacy does not *per se* mean that respondent's evidence is insufficient. Absence of such evidence, however, does preclude application of the evidentiary theory discussed in the text above.

[26]The full text of each of these statements is contained in Appendix B, pages v-xxiv, *infra*. Petitioner also wrote the book *Native Daughter* (Ex. GW, R. 6208). Respondent has never contended that this book, a biography of one Anita Whitney, tended to prove the charge against petitioner. Consequently we shall not prolong this brief with an analysis of this book's contents.

Two of the statements appeared in the columns of the *Daily People's World*. The first, published in November 1947, was entitled "Save the Peace" (Ex. FM, § 2, p. 1, R. 5106). In it petitioner says that the cold war is not the fault of the Russians but was caused by a change in United States foreign policy. He alludes to a group of persons which he denominates "Russia-haters", and says that war-like pronunciations by them have led to a deterioration of U. S.-Soviet relations. He states that world peace depends primarily upon cooperation between these two nations. The second article was published in July 1949. This was a statement, signed by Richmond and two other editors who were not named as co-conspirators, concerning "white chauvinism and anti-Mexican chauvinism" as these attitudes had appeared in the columns of the *Daily People's World* (Ex. 330, R. 3553-56). The statement points out examples of the asserted evils, discusses why they are undesirable, and pledges the editors to endeavor to avoid such occurrences in the future.

A third article, entitled "Strike Struggles—Some Key Conclusions", was published in a pre-convention discussion bulletin of the Communist Party (Ex. 191, R. 2834). Richmond labels the leadership of the A.F.L. and C.I.O. as a "sellout bureaucracy" because of its "'no-strike' pledge". He discusses some strikes which have occurred and concludes that the rank and file in the labor unions do not agree with their leadership. He states that "the capitalist, particularly the big monopoly section of capital" is the "enemy of the worker".

Can these articles be posited as the basis for a rational inference that petitioner conspired to advocate violent revolution? It is difficult to approach this question objectively. The very notion that the expression of legally permissible political views, no matter how unpopular, constitutes evidence of the alleged conspiracy is repugnant to the whole concept of free speech. Nonetheless, since that notion is implicit in respondent's case, it must be analyzed. The argument that such evidence is proof against petitioner would have to run thusly: By hypothesis, some of the alleged co-conspirators had agreed to advocate violent revolution; those persons and petitioners had in common certain beliefs concerning the 'cold' war, racial discrimination, etc.; from this commonality of belief it can be inferred that petitioner's views as to force and violence were the same as the hypothetical co-conspirators'; from this inferred concurrence of beliefs it can be inferred that petitioners and the supposed co-conspirators agreed to advocate forcible overthrow of the Government.[27]

The absurdity of the argument is obvious. Consider the initial inference. Because petitioner and another person both believe in racial equality, and because the other person also believes in violent revo-

[27] A similar line of reasoning was rejected by this Court in *Keegan v. United States*, 325 U.S. 478 (1945). There the evidence showed that petitioners had expressed ideas generally hostile to this country. These ideas undoubtedly were held by persons who would have done all in their power to discourage and prevent any military preparation by the United States. This background evidence, however, was held insufficient to establish that other statements made by petitioners constituted a "counsel to evade" military service.

lution, we are asked to deduce that petitioner believes in violent revolution. The political views which petitioner expressed probably are shared by most members of the Communist Party and in part by millions of Americans. Certainly it would be illogical to conclude that all these people believe in violent overthrow of the Government. It is no more logical to infer that petitioner holds such a belief. The basic error in the logic is the implicit assumption that there is a correlation between a belief in the views petitioner expressed and belief in force and violence. To say the least, the assumption is unsupported by any evidence in the record of this case. Consequently that assumption and the argument based upon it must be rejected.

The fourth article, "Use the Press as a Key Political Weapon," was published in a convention report of the California Communist Party (Ex. 186, p. 7, R. 1533). In this article Richmond purposes closer cooperation between the Communist Party and the *People's World* so as to boost the paper's circulation, improve its content and make the paper more effective in political campaigns around current issues such as the Mundt-Nixon bill. Also, in 1950, while at a local convention of the Communist Party, he spoke briefly on "the necessity of recruiting" (R. 3568-70). These statements indicate petitioner's support of the Communist Party. This was never denied. The question is whether he lent this support so as to strengthen a medium for the advocacy of violent revolution. Unless that question can be answered affirmatively, the statement concerning the newspaper and the talk about recruiting prove nothing. Neither the article

nor the talk in themselves are evidence of purpose. Nor is there other evidence of purpose. Thus it is just as reasonable to infer that petitioner's purpose was to further the Communist Party's legislative program as it is to impute a desire to advocate a proscribed doctrine. This is especially true in light of the fact that the evidence in this case shows that Richmond spoke on current political issues but fails to show that he advocated violent revolution.

One further statement by petitioner must be examined. In 1946 Richmond spoke to a group of Communists—none of them alleged co-conspirators—urging them to support the *Daily People's World*. In the course of this discussion he is reported to have "stressed the Leninist and Marxist approach to every issue of the paper" (R. 3953-54). This is the only testimony in the over 14,000 pages of record which links petitioner Richmond with "Marxism-Leninism". From this testimony it is reasonable to infer that petitioner had some knowledge of some aspect of the body of writings and theories denoted by the term "Marxism-Leninism". It is a long jump, however, from this inference to the conclusion that petitioner agreed to advocate violent overthrow. Unless legal precedent and the evidence in this case are both to be ignored,[28] it must be conceded that belief in "Marxism-Leninism" does not *in itself* show adherence to the doctrine of violent revolution. Consequently, if the testimony above is to have any significance, it must be shown that

[28]Respondent's theory that adherence to "Marxism-Leninism" is equivalent to advocacy of violent overthrow of the Government is considered at pages 82-91, *infra*. See also note 29, *infra*.

petitioner Richmond personally interpreted "Marxism-Leninism" as calling for the forcible overthrow of the Government.

There is no evidence, not a single line in the entire record, to show this. His reference to the "Leninist and Marxist approach" to the *Daily People's World* is not proof that he understood "Marxism-Leninism" as equivalent to violent revolution. Indeed, quite the contrary is true. Since he used the terms "Leninist" and "Marxist" in reference to the newspaper, it is reasonable to look to its columns as evidence of what he meant. The contents of those columns are completely inconsistent with the theory that Richmond believed in force and violence. There are editorials urging the reader to vote (Ex. AL, p. 1, R. 1883), discussions of current social problems (Ex. DX, R. 4295) and proposals for democratic action (Ex. 159A, p. 1, R. 5302), but not one word even hinting at violent revolution. Since there is such evidence of what petitioner's use of "Marxist" and "Leninist" meant, and since there is no evidence to show that he was referring to the proscribed advocacy, it would be contrary to both reason and law to infer from the above testimony that Richmond believed in violent revolution.[29] But even if the belief be inferred, what evi-

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[29]This Court has not infrequently considered whether evidence that a person subscribes, *in general*, to some broad political philosophy constitutes sufficient proof that the person adheres to a *particular* tenet that might be, but is not necessarily a part of that philosophy. *Keegan v. United States*, 325 U.S. 478 (1945); *Hartzell v. United States*, 322 U.S. 680 (1944); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943). In each of these cases the Court's answer has been that such evidence is *not* sufficient. In all of those cases except *Schneiderman* the evidence was far stronger than here. In those cases, in addition to evidence that the petitioner

dence is there to show that the belief resulted in petitioner's alleged participation in the supposed conspiracy? To deduce such participation from his reference to the "Leninist and Marxist approach" would be to pile one uncertain inference upon another. This is not the stuff which substantial evidence is made of.

4. Statements Attributable to Petitioner Connelly.

Perhaps the most significant of petitioner Connelly's statements is the one he made in April 1947 at a Communist Party club meeting. The members of the club were discussing their respective reasons for having joined the Communist Party. Connelly's statement, as reported by respondent's witness, was that

> "the reasons he was a member of the Communist Party was that it afforded him an opportunity for organization and direction in the struggle; it additionally afforded the chance to develop leadership; and thirdly, enabled in this particular club, to organize and direct the policies of the union in which he was active" (R. 7637-38).

This statement is significant not only for what it does contain but even more so because of what is absent from it.

The statement contains nothing to indicate that petitioner was interested in violent revolution. Of course, since this was not a meeting of the alleged conspirators, it is arguable that Connelly would not be speaking frankly. However, if petitioner were an ad-

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adopted some general political line, there were actual statements by the petitioner closely related to intent or belief essential to the case against him. If such evidence is insufficient surely petitioner Richmond's statement concerning a "Marxist" approach to the newspaper is even less sufficient.

herent of violent revolution; it is only reasonable to suppose that he would have advanced this idea in some way. That Connelly did not, indicates that he was not a participant in the alleged conspiracy.

Concedely the statement is ambiguous. It does not specify the "struggle" in which he was interested, the purposes for which he wished to "develop leadership," nor the direction in which he wished to guide union policies. However, the record contains no evidence of a statement by Connelly even hinting at the notion that he wished to develop leadership or direct his union in a struggle for violent revolution. The statements he did make show that the "struggle" he was interested in was one having to do with the political issues currently facing the American people.

Thus in June 1940 he participated in a discussion of the coming presidential campaign, at which slogans were considered, to wit: "Don't support the imperialist war; vote Communist; vote for Browder and Ford" (R. 5527-29). In March 1941 Connelly attended a discussion concerning the European war and how Communists might mobilize sentiment against this country's participation in it; he said that Communists could do a good job in the trade unions (R. 5553-55). Three months later he was one of 75 Communists who met to consider the organization of support for a strike then in progress; apparently the Federal Government had indicated that it might step into the strike, and petitioner spoke on the "need to mobilize support of the strike . . . and the need for Communists

to get together and mobilize the city and protest government interference" (R. 5556-57).

Whatever the wisdom of Connelly's views on political candidates, international affairs and the settlement of strikes, he was entitled to hold those views and to seek to win adherents to them. Alleged co-conspirators probably agreed with Connelly, but such agreement hardly constitutes evidence that he joined with them in the supposed conspiracy to advocate violent revolution.[30] Indeed, the content of Connelly's expressions indicates just the opposite. Everything he said was directed at organizing the democratic expression of opinion on issues of immediate concern to the general public.

The record contains evidence of three other statements attributable to petitioner Connelly. In 1938 those delegates to an American Newspaper Guild convention who were members of the Communist Party held a caucus. They discussed how they might achieve the aims of the Communist Party at this convention. Those aims were the adoption of a resolution on the civil war in Spain and the election of a Guild executive board controllable by the Communist Party. Petitioner said he would do what he could to further those aims (R. 7733-40).

Connelly's support of a resolution on Spain proves no more than any other expression of opinion on a topic of current interest. That he agreed to work

[30]The argument that such a commonality of belief *would* be evidence against petitioner is discussed *supra* at pages 51-52.

toward a Communist-controlled executive board is irrelevant unless the purpose of attaining control was in some way linked with advocacy of forcible overthrow. If there was any such link, respondent's witness, whose memory was remarkable, failed to testify concerning it. Absent such evidence petitioner's statement provides no rational basis for an inference that he conspired as charged.

In 1945 one of respondent's witnesses, at that time a Communist Party member, asked petitioner why the Party had issued a letter criticizing the witness. Connelly told the witness not to talk to him about it but to take the matter up at Communist Party headquarters (R. 6454-55). The relevance of this evidence escapes us. The obvious inference is that petitioner simply did not know the answer to the question which the witness had asked; consequently Connelly suggested that the witness look elsewhere for information, and the logical place to find out about a letter issued by the Communist Party is at Party headquarters.

The last statement with which petitioner was connected occurred in May 1947. Connelly was present at a Communist Party club meeting; the subject being considered was "whether or not the Party would have to go underground" (R. 7635, 7638-40). What petitioner said, if anything, was not stated by respondent's witness. Nor do we know what the consensus of the meeting was. It would be reasonable to infer that someone said the Communist Party should go "underground." Assuming this to be true, such a statement is significant only if (a) Connelly agreed with it and

(b) such agreement constitutes proof of participation in the charged conspiracy.

In the first place, the evidence fails to show that petitioner was in favor of going "underground." The question being discussed was "*whether*" an "underground" would be necessary. It is as reasonable to suppose that petitioner's answer to that question was "No," as to suppose that he answered "Yes." This being so, the jury could not find that he did approve of the "underground," and the testimony loses all significance. However, even if Connelly had supported the "underground," this would be of no consequence.

In order for proof of support of an "underground" to be evidence of participation in the alleged conspiracy, it must be shown that the purpose of the "underground" was related to the purpose of the conspiracy. The only *possible* way in which an "underground" could serve the supposed conspiracy would be by concealing advocacy of violent revolution. Consequently, petitioner's hypothetical approval of the "underground" would be evidence against him only if his purpose was to conceal illegal advocacy. However, since the evidence shows only that Connelly was present when the "underground" was discussed, it is impossible to determine why he favored it, if he favored it at all.[31]

There is no evidence that anyone thought of an "underground" as a method for hiding illegal advo-

[31] The views of the trial court in *Flynn v. United States* as to the significance of presence at or participation in a discussion of the "underground" are contained at page 89, *infra*.

cacy. Indeed, the testimony is all to the contrary. Respondent's witness Lautner said that if the Communist Party were declared illegal, it would use the "underground" in order to "fight its way back to legality . . . get back to a legal status" (R. 2565). Another of respondent's witnesses said that Communist Party clubs were divided into smaller units—part of the "underground" system—because of fear of violence from private groups and harassment by Government agencies (R. 4070-71). *If* petitioner Connelly did agree that an "underground" was desirable, the only purposes he could have had in mind, according to the evidence, are those to which respondent's witnesses testified.

Having examined all the contacts between petitioners and the alleged co-conspirators, and having considered the statements attributable to petitioners, we turn now to the final phase of the record concerning them, their activities as editors of the *Daily People's World*.

5. *Whether Evidence That Petitioners Edited the Daily People's World Constitutes Proof That They Participated in the Alleged Conspiracy.*

Petitioner Al Richmond became managing editor of the *Daily People's World* shortly after the paper was founded (R. 546). By 1946, if not sooner, he had become editor and he continued to hold this position at the time this case was tried (R. 7795; 3571-72). Petitioner Philip Marshall Connelly held the position of Los Angeles editor at least since September 1949

(Ex. 749, p. 6, R. 11,599). The *Daily People's World*, although not technically published by the Communist Party, was substantially supervised and controlled by it. Its circulation among the general public was seen as a method for winning adherents to the Communist Party position on current political issues, and also as a means for making contact with persons who some day might be persuaded to join the Communist Party.

Such are the basic facts. Respondent contends that these facts constitute a foundation from which it can be inferred that petitioners participated in the supposed conspiracy. Although the argument is not spelled out, it presumably runs like this:

1. Publication of the *Daily People's World* is an activity which promotes the Communist Party, and petitioners must have known this.

2. The promotion of the Communist Party, as the indictment charges, was an object of the alleged conspiracy.

3. Since petitioners, by editing the *Daily People's World*, were helping the Communist Party, they were in effect aiding the alleged conspiracy.

4. Therefore petitioners were participants in the alleged conspiracy.

This argument is open to an obvious objection: It assumes the very point in issue. That petitioners in editing the *Daily People's World* were seeking to aid the Communist Party is obvious. However, the important question is not whether petitioners sought

to promote the Communist Party but whether they sought to promote it *as a medium for the advocacy of violent revolution.* Only if that was the purpose for which they edited the newspaper would their editorship be evidence of connection with the supposed conspiracy. Why petitioners did seek to aid the Communist Party is a question which is not answered by showing simply that they edited the *Daily People's World,* for the fact of editorship, although proof of support for the Communist Party, sheds no light on the purpose for which the support was given. Consequently the conclusion that editorship shows participation in the alleged conspiracy can be only an assumption, a possibility which, while theoretically susceptible of proof beyond a reasonable doubt, is not established by its mere assertion no matter how oft repeated.[32]

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[32]Assuming that the alleged conspiracy existed and that publication of the *Daily People's World* did in fact abet the conspiracy, the question is whether the nature of petitioners' activity is such that it can be inferred that they *knew* they were aiding the conspiracy. In this connection the case of *Direct Sales Co. v. United States,* 319 U.S. 703 (1943), is in point. The Court there held that it could be inferred that a person who sold grossly excessive quantities of narcotics to a doctor knew that the materials sold were being illegally used and thus was part of a conspiracy to violate the narcotics laws. In arriving at this decision the Court considered the applicability of *United States v. Falcone,* 311 U.S. 205 (1940). In that case there had been sales of sugar to persons who used this material in an illegal distilling operation; it was held that the evidence did not establish the seller's knowledge of the illegal use. In deciding the *Direct Sales* case the Court pointed out that sugar is an unrestricted commodity and therefore that its sale would not raise an inference of knowledge of illegal use; on the other hand, the purchase of unusually large quantities of narcotics would arouse suspicion.

If, by analogy, we consider the alleged conspiracy in the instant case as a "buyer," and petitioners as "sellers," it seems clear

If the alleged conspiracy actually existed and *if* petitioners knew of it and *if* they approved of it—if all these matters were proven, then the fact that petitioners edited the *Daily People's World* might constitute evidence of participation in the alleged conspiracy. However none of these "ifs" has been established by any of the evidence thus far examined—the testimony concerning meetings, the evidence of petitioners' statements, the fact of editorship. One body of evidence still must be considered, the constellation of fact surrounding the *Daily People's World.* Whether this evidence permits an inference that publication of the newspaper was part of the alleged conspiracy *and that petitioners knew this* is the question to which we now turn.

Content. Not one word expressly advocating or interpretable as advocating the violent overthrow of the Government has ever appeared in the *Daily People's World.* Quite the contrary. The paper has consistently appealed to its readers to seek remedies to asserted social evils through the use of democratic processes. Thus, in so far as the content of the *Daily People's World* is concerned, the evidence not only fails to support respondent's case but actually conflicts with it.

Support, Supervision and Use by the Communist Party. The Communist Party supported the *Daily*

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that no legitimate inference of knowledge of the conspiracy could arise from petitioners' activity. Publication of a newspaper is innocent on its face just as was the sale of sugar in the *Falcone* case. In addition, the publication of newspapers, being vital to the democratic process, should not be permitted to be the basis for inferences of criminal activity.

People's World, supervised its content and used the paper in its activities. The evidence shows that petitioner Richmond in general approved of this relationship between the newspaper and the Communist Party, and it would be reasonable to assume that petitioner Connelly also approved. These facts, however, are significant only if Communist Party support, supervision or use was manifested in some way which would have indicated to petitioners that behind the Communist Party stood the alleged conspiracy to advocate violent revolution.

Communist Party support of the *Daily People's World* took the form of money raising and paper selling (R. 1565-66, 5461, 5010). Petitioners participated in some of these activities (R. 1337-38, 1687; 5557-60) and undoubtedly would have been in favor of all of them. It is difficult, however, to see how any relevant inferences could be drawn from these facts.

Supervision by the Communist Party occurred even before the *Daily People's World* was established. The plans for the newspaper—finances, personnel, subscriptions, etc.—were discussed at a district meeting at which petitioner Richmond was present (R. 440-43). Subsequently, the content of the paper also was considered at district meetings, and if those present thought that some particular political or social problem was important enough, the *Daily People's World* would carry an article concerning that problem (R. 441-47). Petitioner Richmond was present at some of these meetings and it can be inferred that he agreed with the decisions which were made concerning the

newspaper's content. What those decisions were is best evidenced by what was printed in the columns of the *Daily People's World,* and as already noted, nothing even remotely connected with advocacy of force and violence is to be found. Consequently the fact of Communist Party supervision could not have revealed to petitioners that publication of the *Daily People's World,* though innocent on its face, was *really* a part of the alleged conspiracy.

The *Daily People's World* was used by the Communist Party in various ways. The record fails to show that petitioners had knowledge of any specific use and consequently it would be difficult to draw any inferences from this evidence. However, even if petitioners knew and expressly approved of the precise ways and instances in which the paper was used, it could not be inferred from this that they had knowledge of the supposed conspiracy. This becomes apparent when the actual evidence as to use is examined.

The Communist Party distributed the *Daily People's World* to the general public in order to convince people that the views expressed in the paper were correct. And within the Party itself articles in the newspaper were used as the basis for discussion of current political issues. In short, the Communist Party used the *Daily People's World* as a propaganda device. If the doctrine of violent revolution was among the ideas which the Communist Party sought to propagate by distributing and discussing the *Daily People's World,* the evidence would have some significance. The content of the paper itself, however,

demonstrates just the opposite: democratic action is what was proposed.

In distributing the newspaper to the general public the Communist Party sought not only to win adherents to a point of view but also to win new members. Assuming that petitioners knew this, their knowledge is of no consequence unless they also believed that there was a conspiracy which sought new Communist Party members as persons to whom the forcible overthrow of the Government could be advocated. There is no evidence that petitioners ever entertained any such belief.

There is evidence that alleged co-conspirator Dobbs, speaking to a meeting not attended by either Richmond or Connelly, said that the *Daily People's World* could be used "to issue instructions to party workers" (R. 4979-89). What kind of instructions were involved was not stated. However, a *Handbook For Club Officers* refers to editorials in the newspaper as guides to action (Ex. MF, p. 15, R. 11,056), and it may be that this was what Dobbs meant by "instructions". If so, and if it be assumed that petitioners knew that their editorials served this function, then it might be inferred that they agreed that the newspaper be so used. Assuming that this inference is true, the words actually printed in the *Daily People's World* show that the only matters in respect to which it could have issued instructions or been a guide were activities such as voting, writing congressmen, etc. Petitioners' assumed agreement that the *Daily People's World* be a guide to action such as this wholly

fails to show that they conceived of the newspaper as part of the supposed conspiracy.

Finally, at another meeting Dobbs said that those Communists who distributed the *Daily People's World* within their clubs should see to it that they would be able to continue to do so even if it became illegal to distribute the newspaper. Petitioners were not present at this meeting and there is no other evidence to show that they knew of Dobbs' statement. If we assume *arguendo* that petitioners had such knowledge, then we must inquire as to whether they would have approved of an illegal distribution: the fact that they edited the paper while it was legal to do so does not show what their attitude would have been if the newspaper were declared illegal. If we further assume that petitioners would have approved the hypothetical violation of law, we then are presented with the critical issue: Does approval of the illegal distribution of a newspaper which has never contained a word concerning violent overthrow of the Government constitute evidence of participation in a conspiracy to advocate that doctrine?

The posing of the question portends the answer. Indeed, what relationship is there between the fact proven (assumed) and the conclusion to be inferred? Two theories might be advanced: first, that the alleged conspiracy had planned to distribute the *Daily People's World* even in violation of law and that petitioners' agreement with such a distribution shows participation in the supposed conspiracy; second, that petitioners' willingness to violate the hypothetical

newspaper law is evidence that they would violate the laws under which they were indicted here.

As to the first theory, there is no evidence of facts which would have indicated to petitioners that the idea of an illegal distribution of the newspaper was hatched by the supposed conspiracy. Thus even if petitioners had known of Dobbs' statement, they would have considered it simply as one man's opinion as to what the Communist Party might have to do to preserve its newspaper. At the most, petitioners might have thought that the Communist Party—as distinguished from the supposed elite conspiratorial group—contemplated a violation of the hypothetical law. However, since there is no evidence to show that petitioners thought of the newspaper as a device for furthering advocacy of forcible overthrow, the fact that they would violate the law to preserve the paper does not establish any connection between them and the alleged conspiracy.

The second theory is preposterous. A law which would make the *Daily People's World* illegal would conflict with the whole concept of a free press, a concept which is basic to our heritage. If such a law were passed, numerous people of many and varied political beliefs would think it proper to disobey that law. There hardly is any correlation between such an attitude and a willingness to violate the Smith Act.

Miscellaneous Statements Concerning Newspapers. Various statements concerning Communist Party newspapers have been quoted by respondent. Respondent's theory is that these statements show that the al-

leged conspiracy conceived of newspapers as instruments for the fomenting of a violent revolution, that from this it may be inferred that petitioners were in sympathy with forcible overthrow, and that from this first inference it may be inferred that petitioners conspired to advocate violent overthrow of our Government.[33]

The first question is whether the statements could be interpreted as implying that newspapers of the United States Communist Party are a means for bringing about forcible overthrow. If that question is answered in the affirmative, we must ask whether the mere existence of the statements—*there being no evidence that petitioners even had knowledge of these statements*—is proof that *petitioners* conceived of the *Daily People's World* as a promoter of violent revolution.

We shall take the statements one by one, asking as to each whether it can be understood as implying violent revolution. The first statement is from the resolutions of the 1938 Communist Party convention:

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[33]See the brief filed by respondent as appellee in the proceedings herein in the Court of Appeals, pages 85-98. Also, in the Brief in Opposition to Petition for Writ of Certiorari herein, at page 50, respondent says, "The evidence showed that it is a Marxist-Leninist tenet that a Party newspaper is necessary to a successful revolution. . . ." We assume that respondent will continue to rely on this theory and therefore we consider it here. In doing so we wish to point out that the evidence relied upon by respondent consists of exhibits never proven to have been even seen by petitioners. Such evidence, of course, would not be competent to prove that petitioners joined the alleged conspiracy. *Glasser v. United States*, 315 U.S. 60, 74 (1942).

> "The greatest consideration must be given to finally and speedily organizing a mass circulation of the Party press. . . . Of equal importance and urgency with the recruitment of new members, is the rapid expansion of the Daily Worker, Sunday Worker, Daily Record and People's World, on a scale that would correspond to the growing role and influence of our party, as the indispensible instrument for realizing the present objectives and historic aims of the working class movement. . . ." (Ex. J, pp. 17-18, R. 1248).

The critical phrase in this passage is "the . . . historic aims of the working clas movement." It would be reasonable to suppose that those words refer to the establishment of a socialist society. However, that socialism is the end does not imply that violent revolution is to be the means. It is undisputed that petitioners in this case and in cases Nos. 6 and 7 believe in socialism. But whether they thought that its attainment in the United States would require the forcible overthrow of the Government has been one of, if not *the* crucial issue throughout this litigation. That issue is not decided simply by showing that they believe in a socialist state. Consequently the above-quoted statement, since it indicates only that Communist Party newspapers were considered imporant to the establishment of socialism, does not indicate that the editing of such papers was part of a plan for the advocacy of violent revolution.

The next four statements are from articles which appeared in *Political Affairs*, the semi-official Communist Party monthly magazine. From a seventeen

page article entitled "Improve and Build Our Communist Press," respondent extracted these quotes:[34]

> "Let us use our *Daily Worker* as the blacksmith's bellows to blow the smoldering fire of the people's resentment into a fighting flame of struggle and independent political action that will sweep America from coast to coast. . . .
>
> . . .
>
> "Our press, together with the Party as a whole, helps plow the ground, sow the seed of Marxist-Leninist understanding among the masses. Without such work, our Party will not be able to speed the growth of a class-conscious, united working class, schooled in struggle and theory, and led by a strong Communist Party" (Ex. 2, pp. 819, 826, R. 1582).

This statement, like the first one, says nothing about force and violence. It does speak of "struggle," but there is nothing to indicate that "struggle" implies forcible overthrow of the Government. Indeed, refer-

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[34]Respondent quoted two other passages from this same article. We have not quoted them in full since we cannot see how it can even be *argued* that they are relevant. The first (Ex. 2, p. 818) states that the Communist Party needs many newspapers; that those newspapers should "devote . . . major attention to the actual lives, conditions, and thoughts of the workers"; and that the political content of the newspapers should be improved and their circulation increased. The second (Ex. 2, pp. 821-22), in speaking of the attitude which Communists should assume toward the *Daily Worker*, points to the way in which the *Daily People's World* is handled in California as an example of correct attitude. The things which are desirable, the passage states, are (a) that "a great feeling of love for the *People's World* is demonstrated", (b) that the Communist Party has a full time State Press Director, (c) the paper has its own agents in each community, which agents are directly responsible to the newspaper although they "also serve on Party press committees if they are Party members", and so forth.

ence to another article in the same issue of the same magazine shows that the "struggle" contemplated related to political issues then current and was to be waged through the ordinary channels of legislative action:

> "To strengthen and broaden the people's *struggle* against the warmongers, reactionaries and profiteers, labor and all anti-fascist forces must now display far greater political and organizing initiative in developing and leading mass movements and *struggles* in behalf of the most important and pressing economic and political demands of the workers, veterans, Negro people, farmers, and city middle classes.
>
> "These demands include the need for effective price and rent controls; for a decent American standard of living, that is, for wages and trade union standards adjustable to meet any rise in the cost of living; for an adequate federal and state housing program; for an improved GI Bill of Rights and a bonus; for reduced low-income and higher corporate taxes; for the enactment of F.E.P.C., anti-lynching and anti-poll tax legislation, and for outlawing anti-Semitism; for public operation of the major government-built war plants" (Ex. 2, p. 791) (emphasis added).

Thus, if the material quoted by respondent is read in the context of the immediately preceding article, it becomes clear that the newspaper is considered as an aid to the development of activities ("struggles") which are by definition a part of the democratic process. The only counter argument that can be made is that the phrase "Marxist-Leninist understanding"

is found in the statement quoted by respondent, that this *could* refer to violent revolution, and consequently that it is *possible* to understand the quoted statement as implying that Communist Party newspapers are instruments of forcible overthrow. So be it. Possibilities such as this are not by any stretch of the imagination "substantial" evidence.

In the other articles from the magazine *Political Affairs* there are quotes from Lenin and Stalin on the importance of a newspaper. The implication intended by respondent is obvious: since a newspaper was important to the Russian Communists, and since a violent revolution occurred there, a reference to a Russian Communist's statement on newspapers implies that a newspaper of the Communist Party of the United States is an instrument of forcible overthrow. This line of reasoning is dubious on its face, and the actual statements which respondent has quoted do not substantially lessen the doubt.

The first such statement which respondent has cited is:

> "The goal of 100,000 [Communist Party] members is inseparably linked with the building of *The Worker* and the *Daily Worker*. Lenin wrote that the press was not only an 'agitator, but an organizer.' This statement is borne out by the experiences of our brother parties in France and Italy and all other countries" (Ex. 637, pp. 75-76, R. 4487).[35]

[35] Actually, the only part of the above quotation which respondent quoted was the quote from Lenin. We have added the preceeding and following lines to put the Lenin-quote in context.

The next is:

"In building the *Daily Worker* and *The Worker*, the American Communists are aided by the generalized experiences of other Communist parties and by the Leninist teachings on the role of a Communist press. In his historic fight to create a Marxist Party in Czarist Russia, Lenin placed the greatest emphasis on creating a newspaper which would unite and link together the then-existing separate Marxist organizations into a single Party. Lenin put forward and carried out a plan for the founding of *Iskra* (The Spark)—the first newspaper of the Revolutionary Marxists on an all-Russian scale—which made its appearance in 1900. . . .

"In his famous work *What Is To Be Done?* Lenin wrote:

> 'In our opinion, the starting point of all our activities, the first practical step towards creating the organization we desire, the thread that will guide us in unswervingly developing, deepening and expanding that organization, is the establishment of an all-Russian political newspaper. A paper is what we need above all; without it we cannot systematically carry on that extensive and theoretically sound propaganda and agitation which is the principal and constant duty of the Social-Democrats (read: Communists) in general, and the essential task of the present moment in particular, when interest in politics and in questions of socialism has been aroused among the widest sections of the population.'

"The teachings of Lenin on the role of the Communist press, which apply most urgently to-

day, have helped to stimulate and increase the activities of thousands of Communists and other friends of *The Worker*" (Ex. 265, pp. 74-75, R. 6608.)

These two statements say no more than what has already been noted: Distribution of Communist newspapers to the general public can serve as a means of gaining new Communist Party members. Is the fact that Lenin was quoted as authority for this proposition evidence that the new members were to be taught that violent revolution was necessary in the United States? It is conceivable that one reading these statements might so interpret them, but it seems highly unlikely. Certainly there is no general assumption that the citation of an authority implies agreement with everything the person cited ever did or said. Moreover, since the first statement refers to the Communist Parties of France and Italy, and since those Parties have been seeking to attain power by winning a majority of the voters, that statement is quite reasonably read as affirmatively declaring that such is the road to power in this country. At least this is as reasonable an inference as the conclusion that the Russian revolution constitutes the blue print.

The last of respondent's extractions from *Political Affairs* is as follows:

> "We should constantly look to the experience of the Bolshevik Party of Lenin and Stalin, which teach us the vital role of the press in the struggle of the working class. The Bolshevik press played a vital part in raising the class con-

> sciousness of the Soviet workers, in building the strong ties between the Party and the masses. *Pravda* was in the center of every struggle, of every united-front movement. In the words of Comrade Stalin: 'The *Pravda* of 1912 was the laying of the cornerstone of Bolshevism in 1917'." (Ex. 268, pp. 169-70, R. 7524).

What this statement seems to say is that newspapers were important in Russia and this shows that they are important in the United States today. The statement does not say that a newspaper of the United States Communist Party is important as a fomenter of violent revolution. The inclusion of the quote from Stalin, since it says that *Pravda* played a part in bringing about the Russian revolution, *might* be taken as implying that Communist Party newspapers in this country serve a similar function. This is a possible interpretation, a possible inference. But one reading the statement might as easily take the Stalin quote simply as an illustration of the degree of importance which attaches to newspapers. These conflicting interpretations are possible if the reader sees only the statement quoted above. However, if he has read the preceding paragraphs there should be no ambiguity, for the author quite specifically states the function of the Communist Party newspaper in the United States:

> "The main task of the Communist press in the United States today is to help develop a broad united-front movement of the working class and its allies for democracy, peace and security. Our press must be a powerful organ providing day-to-

> day guidance in the struggle to bridle the warmongers. It must be a force in the struggle for Negro rights and in labor's fight for higher wages and against reactionary measures directed against it. . . ." (Ex. 268, p. 168).

In addition to the quotes from *Political Affairs*, respondent has quoted from a section in the *History of the Communist Party of the Soviet Union* (Ex. 28, R. 1362). This section, some ten pages in all, was referred to by alleged co-conspirator Dobbs during two meetings attended neither by Richmond nor Connelly (R. 4979-4989; 5014-5018). From that ten-page section respondent extracted and quoted these three sentences:

> "[T]he Party trained a new generation of revolutionary workers—the Pravdists. During the imperialist war this section of the workers remained faithful to the banner of internationalism and proletarian revolution. It subsequently formed the core of the Bolshevik Party during the revolution of October 1917" (Ex. 28, p. 159).

These three sentences convey the impression that *Pravda* itself was a kind of training ground for violent revolutionaries. This impression is significant if it is reasonable to suppose that Dobbs would be understood as saying that the *Daily People's World* also was such a training ground.

The impression as to the meaning of the quoted passage arises from the quotation of the phrase "a new generation of revolutionary workers—the Pravdists." If one reads only the matter quoted by re-

spondent, he assumes that "the Pravdists" were those persons who were working on the newspaper *Pravda*. However, a sentence which appears earlier in the section to which Dobbs referred showed that the word "Pravdists" does not refer to persons working on *Pravda* but to the Russian Communists in general: "The Bolsheviks at that time were called 'Pravdists'" (Ex. 28, p. 153). However, even if *Pravda* had been a school for violent revolutionaries, it would not follow from Dobbs' citation of the discussion in the *History of the Communist Party of the Soviet Union* that Communist Party newspapers in the United States were to serve the same function. The witness who testified to Dobbs' statement said that Dobbs "made an *analogy* . . . to the importance of the paper [the *Daily People's World*] by recalling the effect and value of newspapers during the time of the Russian revolution and the period immediately preceding it" (R. 4986) (emphasis added). Thus Dobbs' reference is most reasonably understood simply as an illustration of the *generalization* that newspapers are important, rather than as a declaration that the *Daily People's World* serves precisely the same purpose as *Pravda* did.

The last of respondent's quotations concerning newspapers consists of two passages from a book by Lenin. There is no evidence that these specific passages were ever referred to by anyone in this country. They are as follows:

> "Everyday propaganda and agitation must bear a genuine Communist character. All organs of

the press belonging to the party must be edited by reliable Communists who have proved their loyalty to the cause of the proletarian revolution" (Ex. 514, p. 202, R. 3815).

"Without a revolutionary struggle for the freedom of the Communist press that will enlist all the masses, preparation for the dictatorship of the proletariat will be impossible" (Ex. 514, p. 174).[36]

If the first passage is significant at all, it is because the phrase "proletarian revolution" is used. The use of this phrase is important only if it is equivalent to "violent revolution." The words themselves are ambiguous. The word "revolution" denotes only a radical change, not a change achieved through forcible overthrow of the Government. The adjective "proletarian" does not imply force and violence. Of course the phrase *might* be interpreted as meaning "violent revo-

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[36]Respondent quoted another passage from Lenin's book. We quote it here, rather than in the text above, because the argument for its relevancy completely escapes us:

"In order to combat this [depriving the revolutionary proletariat of the press by deceit, etc.] the Communist Parties must create a new type of periodical press for mass distribution among workers: first legal publications, which must learn, without calling themselves Communist, and without announcing their affiliation with the Party, to utilize every scrap of legality in the same way as the Bolsheviks did under the tsar in 1905; secondly, illegal leaflets, even of the smallest size, and issued at irregular intervals, but printed in a large number of printing offices by the workers (secretly, or if the movement has become strong, by the revolutionary seizure of printing plants), which shall give the proletariat free, revolutionary information and revolutionary slogans" (Ex. 514, p. 174).

As noted in the text above this passage from Lenin's book was never shown to have been referred to by any one in this country, and of course there was no evidence connecting petitioners with it.

lution," but whether it is so interpreted, will vary from person to person. In the second passage we find the phrase "dictatorship of the proletariat." Those words refer to the government apparatus of a socialist state and imply nothing whatsoever as to how the socialist state is to come into being.

Having examined the various statements concerning newspapers, what conclusion can be drawn as to how they might be interpreted? First of all, none of them expressly proclaim that the publication of a Communist newspaper is part of a plan for advocating violent revolution in the United States. In some of the statements Communist Party papers are portrayed as important to the "struggle," the realization of the "historic aims of the working class movement," etc. However there is no equation of those phrases with "violent revolution," and the context of these statements refers expressly to traditionally democratic activities such as campaigning for the passage of legislation. As to the statements containing quotes from Lenin and Stalin and the reference to the *History of the Communist Party of the Soviet Union,* these appear to be intended simply as an example by way of analogy of the importance of newspapers. This, at least, is the way one reading those statements would be most likely to understand them. If they *can* be understood as implying that Communist Party newspapers are instruments of violent revolution in the United States, the possibility that they *would* be so understood is negated by the context in which the statements are found.

However, in order to proceed with the argument in all its facets, we will assume that *someone* might interpret the statements as indicating that Communist Party newspapers are a device designed to abet the forcible overthrow of our Government. The next inquiry is: Did *petitioners* so interpret those statements? Preliminarily it must be asked whether petitioners even knew of the statements. There is no direct evidence to show that they did. Some of the statements were extracted from articles in *Political Affairs,* a magazine sold within the Communist Party, and one statement was from the Communist Party's 1938 convention resolutions. That petitioners read those statements is a possible inference. However, since it may be assumed that petitioners did not obtain copies of all of the materials sold or distributed within the Communist Party and also that petitioners did not read all of everything they did obtain, it would be reasonable to conclude that they never saw the statements in question. This being so, there is no substantial evidence to show that petitioners had knowledge of the statements and consequently the statements would not even be competent as evidence on the issue whether petitioners participated in the alleged conspiracy.

However, if it be assumed that petitioners did know of the statements, then the evidence would be competent, but its probative value would be nil. Mere knowledge of the statements provides no basis for determining how the statements were understood. We have *assumed arguendo* that someone *might* understand the statements as saying that a Communist

Party newspaper was part and parcel of a plan for the advocacy of violent revolution, but this assumption, itself in actual conflict with the evidence, is not proof that *petitioners* so interpreted the statements. Yet absent such an interpretation, the fact (assumption) that petitioners knew of the statements provides no basis for inferring participation in the alleged conspiracy.

Such, however, is the inescapable conclusion: The various statements concerning the importance of a Communist Party newspaper in no way show that petitioners Richmond and Connelly entered into the supposed conspiracy to advocate violent revolution.

6. Membership in the Communist Party.

We have considered the evidence concerning meetings, statements made by petitioners, and their editorship of the *Daily People's World*. None of these things in themselves, either separately or in conjunction with one another, constitute even the slightest evidence of participation in the alleged conspiracy. It also is true that membership in the Communist Party in itself would not be proof that petitioners were guilty. The final question is whether the fact that petitioners engaged in the various activities already examined *as members of the Communist Party* —whether this combination of facts is substantial evidence that they were a part of the supposed conspiracy.

The only theory under which membership in the Communist Party could significantly supplement the other evidence would be this:

1. The Communist Party was organized by various persons who in forming the organization proclaimed that it was based on "Marxism-Leninism" and that the teaching of "Marxism-Leninism" was an essential part of the Communist Party program.

2. This teaching of "Marxism-Leninism" is synonymous with the advocacy of the violent overthrow of the Government.

3. The evidence shows that petitioners knew that "Marxism-Leninism" as advocated within the Communist Party was equivalent to the advocacy of force and violence.

4. If petitioners knew this and still engaged in activities which supported the Communist Party, then they must have intended to promote advocacy of violent revolution.

5. This intent, combined with petitioners' activities, constitutes participation in the conspiracy.

That the Communist Party advocated "Marxism-Leninism" is undisputed. That petitioners knew this unquestionably is true. We think that there is no substantial evidence to establish any of the other assertions contained in the above argument.[37] However, in so far as petitioners are concerned the validity of the argument depends, in the first instance, on whether

[37] The briefs filed in cases Nos. 6 and 7 discuss the sufficiency of the evidence to show that the petitioners there interpreted "Marxism-Leninism" as involving the violent overthrow of the Government of the United States. We agree with the contentions therein, that the evidence is insufficient as to each petitioner.

the evidence shows that they understood that the teaching of "Marxism-Leninism" within the Communist Party constituted advocacy of violent overthrow of the Government of the United States. It is that question which we shall consider here.

There is no direct evidence at all concerning petitioners' understanding of "Marxism-Leninism." They were not even shown to have attended any classes, read any books, participated in any discussions on that subject. Absent direct evidence, it would be necessary to show that petitioners possessed some attribute from which it could be inferred that they understood the advocacy of "Marxism-Leninism" to be an advocacy of violent revolution. The only evidence there is, however, is the proof that petitioners were members of the Communist Party and as such engaged in wholly lawful activities. If from this evidence it can be validly inferred that petitioners understood "Marxism-Leninism" as synonymous with force and violence, then the inference could be equally valid as to each and every Communist Party member. To say that petitioners so understood when other Communists did not would be arbitrary. There would be no answer to the question, "Why petitioners if not the others?"

The question then is whether it is valid to conclude that a person who is a Communist *necessarily* equates "Marxism-Leninism" with advocacy of forcible overthrow of the Government of the United States. There is no proof in the record that all members of the Communist Party understood "Marxism-Leninism" as equivalent to violent revolution. Certainly such a uni-

form understanding cannot be assumed. "Marxism-Leninism," after all, is not a mathematical formula. *Schneiderman v. United States*, 320 U.S. 118 (1943). It purports to be a system of philosophy governing all forms of human activity and providing the answers to such basic problems as those of epistomology, the interpretation of history, and so forth (R. 2572). Has there ever in the history of mankind been a philosophy so clear cut that all men, even all who called themselves adherents, understood it in the same way? There is no such uniformity in the interpretation of religious systems. Constitutions receive many and varied interpretations; their meanings change with time and circumstances. Even statutes, immeasurably more specific and limited than the body of materials denominated "Marxism-Leninism," are often subject to different interpretations, claims of "plain meaning" notwithstanding.

That such divergencies of understanding should exist is almost inevitable. Philosophies, ideas, are communicated from person to person by the use of words. Certainly our present-day knowledge of semantics makes it clear that the communication process is inherently ambiguous. As members of the legal profession we constantly encounter such ambiguities.

These general observations are particularly significant in the context of the facts of this case. Assuming that "Marxism-Leninism" can be interpreted as calling for the violent overthrow of the Government, the fact is that the Communist Party disclaimed the use of force and violence in its constitution (Ex. 21, R.

1518; Ex. 153, R. 2089).[38] How then could it be assumed that all Communists understood "Marxism-Leninism" to equal force and violence? Actually the evidence shows that the books which were a part of "Marxism-Leninism" were interpretable in different ways and in fact were interpreted differently by members of the Communist Party (R. 2602, 2657, 4423-26, 8542-50). How then can it be inferred that petitioners *because they were members of the Communist Party* understood "Marxism-Leninism" in any particular way?

The answer, we think, is clear. The inference is *not* permissible. It is contrary to all we know about the history of philosophies. It conflicts with scholarly thought and everyday experience in the field of semantics. It could be indulged only if uncontradicted evidence is to be put neatly to one side and conveniently disregarded. If, in cases such as this, the "substantial evidence" rule is to have any meaning, there must be a requirement that something other than a bare association with "Marxism-Leninism" be proven. Certainly the minimum which should suffice would be direct evidence showing that the particular defendant specifically understood "Marxism-Leninism" as a call to the violent overthrow of the Government of the United States.

That such evidence should be present before the case can be submitted to the jury was recognized by the

[38] In the *Dennis* case there was testimony that the defendants intended and understood this disclaimer to be a cloak for alleged conspiracy. There is no such evidence in the instant case.

trial court in *United States v. Flynn*, Criminal No. 137-7, S.D.N.Y. (1953). In that case the court directed verdicts of acquittal as to two defendants, a Mr. Begun and a Mr. Gerson. In discussing the general question of what kind of evidence is necessary to show knowledge of the alleged conspiracy, the court said:

> "The Court: We are agreed that the crucial question is knowledge, to bring something home personally to the defendant."[39]
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> "The Court: . . . I think you have to bring it home more closely than saying, 'Why, he was so active in the organization that it just must have seeped into him somehow or other.' I think you have really got to get him in contact with that tenet [the doctrine of violent overthrow of the United States Government] in his activities in some way or other. That is what I should say was necessary.
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> . . .
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> The Court: . . . I think there must be some showing that the particular activities were such as to bring them in contact with the particular tenets of the Party that are treated as illegal in this case. . . ."[40]

The court then went on to consider whether the evidence as to each defendant was sufficient to submit the case to the jury. The evidence as to Begun showed that in the 'thirties he was Legislative Secretary of District 2 (New York) of the Communist Party and later became Educational Director of District 2. He

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[39] Transcript of Record, p. 9951, *United States v. Flynn*, *supra*.

[40] *Id.* at 9961-62.

was seen around Communist Party headquarters in the early 'forties. He said that he was interested in Communist infiltration of the Farmers' Union of New York. He attended the 1945 New York State Convention of the Communist Party and thereafter was County Organizer for Bronx County and a member of the New York State Committee and the New York State Board. He was a student at the 1947 Communist Party National Training School. He attended the 1948 Communist Party State Convention. In the fall of 1949 he attended a meeting in New York pertaining to the "underground" organization of the Communist Party. And a witness who said he was assigned to distribute certain literature to Communist Party *leaders* gave copies to *this* defendant.[41] The court held that this evidence was insufficient to go to the jury. As to the testimony concerning the defendant's attendance at the Communist Party school, the court pointed out that there was no specific showing that the defendant while in attendance came into contact with the idea of forcible overthrow:

> "The Court: I think Begun is the next.
> Mr. Marks [Government counsel]: Yes, sir. With reference to Begun, we have in addition to the fact that he held office since the thirties, his attending as a student the 1947 National Training School. . . . That brings knowledge home to him very directly.

[41] The summary of the evidence concerning Begun is taken from the memo in opposition to motions for judgment of acquittal filed by the Government in *United States v. Flynn, supra.*

"The Court: There was a great deal of difficulty in showing that the defendant Begun was there and heard everything that was said."[42]

And, when counsel for the Government pointed out that Begun had participated in a discussion of the "underground," the court said:

"The Court: Well, you and I differ about the underground. It seems to me something more than the fact that people want to keep their activities secret is necessary to show that their activities are illegal, and certainly something more is necessary . . . than secret activity . . . to show that he knew what Budenz thought Marxism-Leninism was."[43]

The evidence as to the defendant Gerson showed that he had been a member of the Communist Party since 1935, was on the staff of the *Daily Worker* in the early 'thirties, and was seen at the offices of the *Daily Worker* and the offices of the National Committee up until 1943. After 1945 he was Legislative Secretary of the New York state organization, a member of the State Committee of the Communist Party and attended State Board and state Organization Committee meetings. In 1948 he attended the National and the New York State Conventions of the Communist Party. In addition he was present during a speech on "concentration in New York County," and he is reported to have said that a certain Mr. Dunn deserved praise because he represented "the Marxist-Leninist posi-

[42]Transcript of Record, p. 9978, *United States v. Flynn*, *supra*.
[43]*Id.* at 9980.

tion."[44] The discussion of the sufficiency of this evidence was, in part, as follows:

"The Court: What about Gerson?

Mr. Marks: With respect to the defendant Gerson, your Honor, he was a member of the Party and during the early thirties was on the staff of the *Daily Worker*. Of course, that has been shown to be the Party organ and the medium of carrying out Party policy and Party expression to the membership. So I place considerable stress on that. That is not just Party membership; that is something else again.

. . .

The Court: Well, that is rather passive. Can you point to any statements by him?

Mr. Marks: We have another thing, your Honor, prior to the indictment period: In a conversation with Budenz where the defendant praised somebody named Dunn because he represented the Marxist-Leninist position. . . .

The Court: You must rely on something to indicate that when Gerson said Marxist-Leninist position he meant the same thing that you do.

Mr. Marks: We have another thing, your Honor. . . . we have specific evidence of his having been present when the very important Tormey report on concentration in New York County was delivered. Your Honor will recall that is the report which stresses the transportation industry and different forms or phases of transportation as concentration tasks in New York.

The Court: Was there really anything in the Tormey report, except that it would be a good

[44]The summary of the evidence concerning Gerson is taken from the memo in opposition to motions for judgment of acquittal filed by the Government in *United States v. Flynn*, *supra*.

thing for the Communists to concentrate in these industries, or anything about Marxism-Leninism, or force and violence?

Mr. Marks: Nothing overtly about force and violence, your Honor. . . ."[45]

It seems quite clear that had the trial judge in the *Flynn* case been presiding over the trial of the instant cause, the cases against Richmond and Connelly never would have been submitted to the jury. As with Gerson and Begun, the evidence concerning petitioners here shows simply that they were members of the Communist Party and as such participated in lawful activities. There is no evidence to show that they understood the Communist Party's adherence to "Marxism-Leninism" to constitute advocacy of force and violence. This being so, petitioners' attendance at meetings, work on the *Daily People's World*, etc. do not constitute a sound foundation—substantial evidence—from which to infer participation in the supposed conspiracy. These activities prove only what they show on their face, lawful endeavors in the fields of speech, press and assembly.

C. The Evidence Concerning Intent

An essential element of the crime with which petitioners Richmond and Connelly were charged is an intent to overthrow the Government of the United States by force and violence as speedily as circumstances would permit. The only matters in the record

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[45]Transcript of Record, pp. 9984-86; *United States v. Flynn*, *supra*.

relevant to whether petitioners did so intend were set forth in the discussion of the evidence concerning participation in the alleged conspiracy—there simply is nothing else in the record even remotely concerning Richmond or Connelly. That evidence is insufficient to establish the requisite intent for the same reasons that it is insufficient to prove participation in the supposed conspiracy. Indeed, a discussion of the intent problem really is superflous. However, since we wish to explore all facets of respondent's case, we shall ignore the fact that there is no evidence to show that petitioners joined the alleged conspiracy and proceed to the question of intent.

Since there is no evidence concerning intent other than that previously examined, the only theory upon which it could be contended that the testimony establishes the charged intent is this: The evidence shows that petitioners agreed to advocate violent overthrow of our Government and from this agreement it can be inferred that they intended to cause such overthrow as speedily as circumstances would permit. The initial difficulty with such a theory is that there simply is no proof that petitioners did agree to advocate force and violence. This is not the only difficulty. However in order to reach and analyze the others it is necessary to overlook the absence of support for the basic premise. Consequently we shall assume for purposes of the ensuing discussion that there was proof that petitioners agreed to advocate violent revolution. It should be clear that we think such an assumption utterly unwarranted, indeed contradicted, by the evidence in this

case. We make the assumption only because it otherwise would be impossible to examine the full length of the chain of inferences upon which respondent relies to hold its case together.

Assuming, then, that petitioners joined in the alleged conspiratorial agreement, there are two problems as to intent: whether it can be inferred from the inferred agreement that petitioners intended to cause violent overthrow of the Government of the United States; whether it can be inferred that they intended to cause it "as speedily as circumstances would permit."

1. The Intent to Overthrow the Government by Force and Violence.

In most conspiracy cases the only intent which need be proved is the intent to accomplish the object of the conspiracy. This state of mind is easily inferrable from the fact that the defendant did conspire. If a person *agrees* to do *x*, it is reasonable to infer that he *intends* to do *x*. Thus if it is proven that a defendant agreed to rob a bank, it can be inferred that he intended to rob the bank. In the instant case the indictment charges an agreement to *advocate*. Thus, if it be assumed that petitioners agreed to advocate, it might be inferred that they intended to advocate. Such an intent, however, would not suffice here. Here it is necessary to prove not only that petitioners intended to *advocate* but also that they intended to *cause* violent revolution.

Can the intent to cause forcible overthrow be inferred from an agreement to advocate it? There seems

to be no logical barrier to such an inference; there is some connection between an agreement to advocate x and an intent to accomplish x. However, while the inference is logically possible, it is not logically necessary; there is nothing illogical about a man who would advocate violent revolution although he personally would not wish to cause the revolution itself. The jump from words to action is a big one. Consequently, whether the intent to cause violent overthrow can be inferred from an agreement to advocate is a question of fact rather than logic. The answer to that question depends, at least in part, upon the solidity of the foundation which must support the inference.

That foundation is the inferred agreement to advocate. It is pertinent, therefore, to note again the type of materials out of which that foundation was constructed. It was necessary to infer the agreement from activities which are all innocent on their face and some of which—speaking on political issues, editing a newspaper, etc.—constitute the lifeblood of a democracy. Assuming, nevertheless, that the agreement might be inferred, would not a further inference based upon it rest on mounds of sand? The type of thing petitioners did indicates that they looked to democratic processes as the means of change. Thus, even assuming their agreement to *advocate* violent revolution, it would be quite reasonable to suppose that they looked upon violence only as a last resort and did not personally wish to foment forcible overthrow. This, at least, would be as reasonable an inference as the conclusion that they did intend to overthrow the Government by force and violence.

2. The Intent to Cause Violent Revolution "As Speedily as Circumstances Would Permit".

In order to examine the final link in respondent's chain of inferences it is necessary to add to the assumptions heretofore made. We previously assumed that there was proof that petitioners conspired as charged. Now we must assume that there was evidence to show that they intended in some general way to cause violent overthrow. Having laid this foundation —a foundation which finds no support in the record of this case—we can proceed to examine the question whether petitioners intended to cause force and violence "as speedily as circumstances would permit."

This problem has special significance constitutionally. It was the interpretation of the Smith Act, in the *Dennis* case, as involving an intent to cause violent overthrow "as speedily as circumstances would permit" which sustained that statute in the face of constitutional attack: The fact that violent revolution was contemplated "as speedily as circumstances would permit" imported an element of immediacy which served in part to satisfy the clear-and-present-danger test.[46]

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[46] *Dennis v. United States*, 341 U.S. 494, 509 (1951); *Dennis v. United States*, 183 F.2d 201, 213-14 (2d Cir. 1950).

Judges Hastie and Maris, dissenting in *United States v. Mesarosh*, 223 F.2d 449, 459, 461 (3d Cir. 1955), state, "In the leading opinion in the Dennis case, Chief Justice Vinson stressed the fact that the jury must have found . . . . that advocacy was directed toward violent action 'as speedily as the circumstances would permit.' It seems to have been his view that this much proximity was necessary to satisfy the clear and present danger test, which he recognized as a measure of constitutional limitation on Congressional power in this kind of case."

Consequently it is especially important in the instant case, having assumed *arguendo* that petitioners intended to cause force and violence, to see whether they intended to cause it "as speedily as circumstances would permit."

The first question is what does "as speedily as circumstances would permit" mean?[47] Conceivably the phrase could have reference to *any* time in the future, whether that time be one, ten, thirty, a hundred, five hundred or some indefinite number of years from now. Such an interpretation, however, would make the phrase redundant and unnecessary. It would have sufficed for the Court to have said that a defendant must have intended simply to forcibly overthrow the government. The phrase "as speedily as circumstances would permit," if it is to add something to the phrase "intend to overthrow the Government by force," must import some element of immediacy.[48] That this phrase

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[47] This problem has not heretofore been considered by this Court. Since the sufficiency of the evidence was a question not before the Court in the *Dennis* case, the Court was not called upon to decide what facts will suffice to establish an intent to violently overthrow "as speedily as circumstances would permit."

[48] "A Marxist group may lawfully attempt to persuade people . . . that the writings of Marx and Lenin and similar dogma constitute the only acceptable guide to struggle for a desirable kind of society. Thus must be coupled with some call to unlawful action against the government to make the conduct punishable. *But a call to action in the indefinite future is a meaningless contradiction of terms.* Some meaningful orientation in time, whether by specification of the time when action is to be taken or otherwise, is an essential part of every call to action. Thus, the government has found it necessary here; as in the Dennis case, to charge a design to cause violent action as soon as circumstances will permit. . . ." Judges Hastie and Maris dissenting in *United States v. Mesarosh, supra,* note 46, at 461 (emphasis added).

was intended to be so construed is clear from the fact that it originated in the context of the clear-and-present-danger rule.

Just what must be proven to satisfy the element of immediacy is a question we would not even attempt to answer. It seems obvious, however, that if the most that might be inferred from the evidence was that a defendant had some *generalized* intent in respect to violent overthrow—an intent which, if oriented at all, was directed to the remote future—then the defendant could *not* be said to have intended violent revolution "as speedily as circumstances would permit." If this hypothetical intent would suffice, then the "as speedily" phrase would be meaningless surplusage.

What does the evidence in this case show as to petitioners' supposed intent—*assumed arguendo*—to cause violent overthrow. In the first place this assumed intent is predicated upon a lengthy chain of inferences. Not only are these inferences tenuous in the extreme, but, moreover, they provide no basis for orienting the intent time-wise. In other words, there simply is no evidence upon which to base any conclusion as to the historical period to which petitioners' assumed intent had reference. This being so, there is no basis for concluding that the supposed intent involved even the slightest element of immediacy. Consequently there is no evidence to support a finding that petitioners intended to cause violent revolution "as speedily as circumstances would permit."[49]

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[49]Respondent no doubt will rely upon the theory that petitioners were members of the Communist Party, that "Marxism-Leninism" is a part of that organization's program, that adherence

If what petitioners did is any guide, then their intent must have been to influence people on the issues of the day—higher wages, racial equality, foreign policy, etc. These were the things spoken of in the *Daily Peoples World*.[50] These, so far as the evidence shows, were the matters discussed at the meetings which petitioners attended.[51] These were the things on which petitioners themselves spoke and wrote.[52] Such evidence is basically inconsistent with the theory that Richmond and Connelly contemplated forcible overthrow as speedily as circumstances would permit.

If the evidence in this case shows an intent to cause forcible overthrow "as speedily as circumstances per-

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to "Marxism-Leninism" equals adherence to violent revolution, etc. There are two objections to this theory. One objection—that "Marxism-Leninism" is a body of doctrine which must be interpreted and that there is no testimony to show that petitioners interpreted it as involving violent overthrow of the United States Government—has been discussed previously. See footnote 19 and pp. 40-41, *supra*. An additional objection; most applicable to the instant problem, is that a mere showing of general adherence to forcible overthrow would not constitute proof of an intent to overthrow "*as speedily as circumstances would permit.*"

Judges Hastie and Maris, dissenting in *United States v. Mesarosh, supra*, note 46, at 463-64, make this point in discussing the testimony of Government witness Lautner, much of which testimony was repeated in this case: "Lautner did not point to a single thing indicating that the 1945 program [of the Communist Party] contemplated . . . teaching that the time had now come to work for the overthrow of the existing government as soon as possible. . . . [T]his distinction is of basic importance in all constitutional theory of restrictions on utterance permissible under the First Amendment. The line which the courts try to draw distinguishes punishable incitation to insurrectionary action from permissible teaching that at some time in the future violence is inevitable and the 'proletariat' must be ready for it."

[50] See pp. 17-19, *supra*.

[51] See pp. 41-44, *supra*.

[52] See pp. 49-60, *supra*.

mit," then that phrase, designed as a limitation of the Smith Act, is no limitation at all. This Court did not intend that so basic a rule be converted into an empty phrase. This point in itself warrants a reversal of the decisions below.

II.

CONVICTION OF PETITIONERS ON THE FACTS PROVEN IN THIS CASE VIOLATES THE FIRST AMENDMENT.

In *Dennis v. United States* this Court defined the elements of the conduct proscribed by the Smith Act and held that the statute as thus interpreted did not violate the guarantees of the First Amendment. Whether the defendants in the *Dennis* case had conspired as charged, and whether they were proven to have the requisite intent were questions not before the Court. Those questions, in respect to petitioners Richmond and Connelly, are now presented for consideration.

These problems of proof are as significant and important constitutionally as the issues considered in the *Dennis* case. In passing upon the validity of the Smith Act the Court recognized and stated that it involved restrictions upon freedom of expression. It was felt, however, that the construction of the statute had confined those restrictions within permissible bounds. But the *Dennis* formula can be no better than the rules which determine its applicability to any given set of facts. If juries are permitted to engage in speculation and guesswork, to make arbitrary inferences or to choose between equally plausible inferences, the con-

stitutional limitation is converted from a guarantor of freedom into the means by which freedom is repressed. Thus the way in which the Court marks out the boundaries within which evidence will suffice to prove a conspiracy to violate the Smith Act is as much a determinant of the meaning of free speech, press and assembly as was the *Dennis* decision itself. We think that if those freedoms are to be preserved, it must be held that the evidence as to petitioners does not establish guilt.

Of course it will be argued by respondent that the jury must have found that petitioners conspired as charged, having the intent charged, and consequently that the restrictions on speech, press and assembly are permissible. This argument begs the question. Presumably the jury did so find. But the problem is whether, in the light of the First Amendment, a jury should be permitted to make the inferences necessary to the verdicts against petitioners. The solution of that problem, like the answer to any First Amendment question, turns upon a balancing of interests.

Realistically appraised, the convictions of petitioners constitute a prohibition against engaging in lawful activities as a member of the Communist Party. This is what was directly proven as to petitioners. This is what others must *not* do if they would avoid petitioners' fate. Thus the problem of interest balancing involves an analysis of what is to be gained and what lost by preventing such conduct.

On the one hand is society's interest in prohibiting conspiracies to violate the Smith Act. The weight of

that interest necessarily varies with the strength of the proof that a defendant did so conspire. For example, if the evidence as to some defendant in this case showed only that he spoke in favor of trade unions, there would be no basis for supposing that he conspired to violate the Smith Act and thus society's interest in preventing such a conspiracy would be of no consequence. The interest in protecting the right to speak as the defendant spoke, being offset by no competing interest, would prevail and a conviction of the defendant would violate the First Amendment. We have already considered the evidence concerning petitioners. We think it inadequate within the substantial evidence rule, the rule which protects an individual against erroneous conviction of crime. The point here, however, is that this inadequacy also is significant as a factor in the First Amendment equation. The evidence shows that petitioners engaged in lawful speech, writing and assembly; that is all. The inferences necessary to convert such activities into proof of participation in the alleged conspiracy are highly unlikely ones. Thus it also is unlikely that society's interest in preventing such conspiracies would be served by a prohibition of such activities. However, if there is any chance, no matter how slight, that conduct like petitioners' is proof of the forbidden conspiracy, then society has *some* interest in prohibiting that conduct. The problem is whether this interest in prohibiting it is outweighed by the interest in permitting such activities.

While it is highly unlikely that anything is to be gained by a rule under which petitioners' acts would suffice to establish guilt, it is quite clear that much is to be lost. The basic facts underlying petitioners' convictions are membership in the Communist Party plus the expression of unpopular views on questions of foreign and domestic policy. Whether petitioners' ideas were right or wrong is irrelevant. It is relevant, however, that what they said directly conflicted with much that was and still is generally accepted throughout our country. It is precisely this type of expression which must be protected if the values of the First Amendment are to be realized. If a society, a nation, wishes to reap the harvest of knowledge and understanding which flows from the free expression of ideas, it must sow and carefully nurture freedom to challenge central hypotheses, fundamental beliefs, "sacred cows."

> "The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge." (Mr. Justice Frankfurter, concurring in *Dennis v. United States,* 341 U.S. 494, 550).

It is just such orthodoxies which are the basic determinants of our actions as a nation, and thus their validity is of the utmost importance. Only if they can be freely questioned is there any assurance that the premises upon which we act are true.

Petitioners questioned. They spoke and they published. And they stand convicted of conspiring to advocate violent revolution. The lesson for others is clear, and unfortunately it is a lesson which all too many have learned and learned well these past years: Think only "acceptable" thoughts; question not what the majority has proclaimed to be true; say nothing which might be construed as criticism of the established order; and above all, join nothing, for organizations have other members and association with others is dangerous. Such is the aura which develops when membership in an organization and lawful speech, writing and assembly are shackled by chains of inferences which convert such activities into a conspiracy to violate the Smith Act.

> "Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes." (*Ibid.*)

That our society has witnessed such a constriction of freedom of expression seems clear. The signs are all around us. Indeed, who but the hero will venture criticism when criticism leads to suspicion, suspicion to accusation and accusation to sanctions, legal or extra-legal. The conviction of petitioners is a part of this pattern. They were convicted on suspicion and accusation, not evidence. If there were those within the Communist Party who looked to violent revolution, there is no evidence to show that petitioners knew of them. If the alleged conspiracy in fact existed, and if,

as a matter of objective fact, petitioners' activities aided it, there is no evidence to show that they intended to render such aid. Their intent, so far as the evidence shows, was to espouse the ideas they openly stated and to further an organization which publicly proclaimed that it sought to promote socialism, but only through democratic processes. These are the facts, plain and simple. Convictions based upon them are convictions for being members of the Communist Party and uttering dissident views. Such is the substance of this case. That it has been cast in a conspiracy form changes it not one bit.

If the evidence creates any possibility of petitioners' guilt, that possibility is so slight and the freedoms of expression involved so vital that a conviction based upon such evidence must fall if the First Amendment is to stand.[53]

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[53]The argument made above may seem novel in so far as its form is concerned. However we think that it has been implicit in various decisions of this Court. The essence of the argument is that when a statute involves a restriction on freedom of expression, society, as well as the defendant, has an interest in rules of law which delineate the type of evidence from which it is permissible to infer a violation of the statute. It seems apparent that it is this social interest which has found expression in decisions of this Court which have stated that the evidence must be "clear and unequivocal". See, *e.g.*, *Baumgartner v. United States*, 322 U.S. 665, 670 (1944).

CONCLUSION.

For the reasons stated above we respectfully submit that the convictions of petitioners should be reversed and directed verdicts of acquittal ordered.

We think that a passage written a century and a half ago, being a comment on a seditious conspiracy case of that time, is most appropriate here:

> "This faulty mode of reasoning in a circle, will often occur in accusations of this nature, where it is not the offender but the offence, that is sought after—where the government exerts itself not to discover those whom it believes guilty, but to discover of what they are guilty. . . ." BENTHAM, CIRCUMSTANTIAL EVIDENCE 187-88 (1825).

Dated, August 15, 1956.

Respectfully submitted,

AUGUSTIN DONOVAN,

Attorney for Petitioners.

(Appendices A and B Follow.)

18 U.S.C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government:

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U.S.C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U.S.C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the gov-

ernment of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or * * *

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U.S.C. Section 783(f), provides in part:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. * * *"

18 U.S.C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EXHIBIT 186
USE THE PRESS AS A KEY POLITICAL WEAPON

By Al Richmond
Executive Editor, Daily People's World

In speaking for adoption of the resolution on the press, I would be less than honest with this convention, and less than adequate in my responsibilities to the Party, if I did not say I am disturbed at the fact that the report on the press comes at this late hour in our proceedings.

Comrade Williamson has given the general characterization of our work in this field when he described it as the weakest sector of our work. I would like to present some facts and figures which will help to underscore the gravity of the situation, and give the convention a more detailed picture of our weaknesses in this respect.

Circulation Increase Less Than Party Growth

In the three-year period since our last convention, the Party membership in this state has risen some 67 percent. Yet in the same period the circulation of The Daily People's World has risen only, slightly, some 15 percent in its average daily circulation, a figure based on all forms of circulation, subscriptions, newsstand sales, bundle orders and our weekend list. But even that does not give the full picture. If we exclude Los Angeles and Contra Costa counties, in which the circulation has risen, then in the rest of the state there has been an actual decline in circulation during the three-year period!

How is such a fact to be explained? Some comrades will say "underestimation." I don't think that's a full explanation. We use the word "underestimation" too often. It has become a sort of ritual phrase for the confession of sin that brings with it automatic absolution.

When we examine the situation in the counties, we uncover some more interesting facts. Take Los Angeles, for instance. Los Angeles has done relatively better than other counties. Yet even here, while our daily subscription list has gone up some 25 percent during the past three years—and subscriptions still form the basic circulation of the paper—the Party membership has increased 63 percent during the same period. And more. In Los Angeles we have 5100 Party members, but our daily subscription list numbers only 4580. Thus, Los Angeles is the only one of the major counties where the subscription list is smaller than the Party membership.

Let us take an even worse example, Alameda County. I would like the comrades from Alameda to explain the following facts. In your county, comrades from Alameda, the Party membership has registered considerable growth in the past three years. It rose 74 percent, from 577 members to 900. But in the same period, the circulation of the paper has actually declined. The daily subscription list went from 1100 to 971. How do you explain that, comrades from Alameda? When I am confronted with such facts, I am inclined to say, maybe even underestimation is better

than no estimation at all. There doesn't seem to be any sort of estimation reflected in such figures.

Our weaknesses in press work can not be regarded in a vacuum. They cannot be regarded as things in themselves. I say that when we speak of weakness in press work, we are also speaking of weaknesses in our mass work. For, to be correctly estimated, the circulation picture has to be related to the central political tasks placed before the Party by this convention.

Press In Relation To Political Tasks

We have been talking here about the fulfillment of the vanguard role of the Party, and the development of the independent role of the working class through a consistent application of the tactic of the united front from below. These are central tasks of our Party. And to fulfill these tasks, it is necessary to build our paper.

If our policy were based on the concept of the united front from on top, on maneuvers with certain leaders, then there would be no need for a mass circulation of our paper. You don't need a mass circulation to effect such a policy. But when you speak of a united front from below, then you are talking about reaching the masses, and then a mass circulation becomes imperative.

If we wanted to abandon the concept of the vanguard role of the Party, then we wouldn't care about reaching masses of people with our message. But if we are to fulfill a vanguard role, then it is imperative

that we reach masses of people directly, that we build a mass circulation for our paper.

That is how the question of circulation must be understood.

There is no time here for a balanced report on, or review of, the past three years. But there is one other concept that needs comment, one that is related to the central question dealt with before.

Some comrades have this idea: "We have to do this, and we have to do that; there is this campaign, and there is that campaign—and on top of it all we have to bear this cross, The People's World."

PW An Instrument To Help Our Work

Comrades, we do not have to bear any crosses. At least not willingly. Capitalism is a cross, and we are fighting to get rid of it. And if The People's World is really a cross, then we should fight to get rid of it. But this approach misses the whole point, and makes it impossible to proceed to a solution of our problems in this respect. The People's World is not a cross to be borne on top of all our other jobs. It is an instrument to help do the jobs we have to do. If this point is understood, then all other questions in relation to our press work can easily be answered.

If we engaged in a campaign—let us say—let us say, a campaign to defeat the Mundt Bill—then the circulation of our paper is not something we must do in addition to the campaign; it is something we must do to ensure the success of the campaign. The paper must be seen as the instrument to help explain the issue to

the masses of people, to help organize them in the struggle around that issue.

That is the thing that has to be understood. We must build the paper not just to build it as an end in itself; we must build the paper if we are to fulfill our political responsibilities. And once that is understood, then we will not speak of our press work as the weakest sector, and as a result all our work, all the way down the line, will be better.

In moving the adoption of the resolution, therefore, I hope that you vote not only for its passage, but for its implementation; that you vote to go back to your section, county and club with the resolve to carry through the letter and spirit of this resolution in actual life.

1. That during the election campaign, special concentration both in the editorial and circulation work be directed on the weekend edition, with the aim of making it a mass organ of the campaign. That in this connection every club, section and county work out specific goals for the distribution of bundles and the securing of subscriptions during the course of the campaign, and organize to guarantee the fulfillment of these goals.

2. That a campaign of clarification and education be instituted throughout the Party on why and how the Daily People's World should be used in the campaign.

3. That the State Committee, in view of the gravity of the situation, appoint a sub-committee to survey our

press work, and to report back its finding and recommendations to the State Committee.

4. That the State Board institute systematic reviews of the paper's content and line; and that various Party commissions institute similar reviews of the paper as it pertains to their special fields of work.

5. That there be a still further integration of the staff of the paper in the Party committees and commissions to guarantee a greater sensitivity to the tactical orientation and organizational problems of the Party's mass work.

6. That each county, taking inspiration from the example set by Los Angeles, take steps to guarantee the successful fulfillment of the Fighting Fund campaign, within the shortest possible time.

EXHIBIT FM
SAVE THE PEACE

U.S.-Soviet Cooperation By Al Richmond

The flag-draped caskets still are landing on American shores. The corpses that were sowed on the beaches of France and Italy, on the bridgeheads of rivers that traverse Western Europe, on the coral formations of the Pacific islands, are coming home.

And even before these dead reach their last burial place, maniacs propose that new graves and new caskets be readied for the dead of still another war.

Hate Headlines

Headlines of hate are reserved for the front pages. But in the less conspicuous spots of inside pages, the statistics of death still make news. Only last week, the Encyclopedia Britannica released the estimates of Secretary of State George C. Marshall of the casualties in World War II. The Russians, he said, suffered most heavily, lost 7,500,000 men and women in battle, one human being out of every 22 in the vast expanse of the Soviet Union.

Those were the battle casualties. There is no estimate of the civilians who died of hunger and cold and disease in the dreadful sieges and the painful evacuations, or in the territories occupied by the Germans.

For the Russians, this was the third bloodletting in the span of two generations. In World War I, they lost 1,700,000 men, more than any other belligerent. In the war of intervention that was waged against them after their successful revolution exactly 30 years ago, an estimated 7,000,000 men, women, and children perished in battle, or of disease and starvation.

They know war

With such a people, that more than any other bears the deep wounds of war, it should be easy to make peace. To them war is not an abstraction seen through the eyes of a war correspondent or the lens of a movie camera. It is a grim reality marked by close to 20 million graves, by the memory borne by virtually every Soviet family of someone who perished.

Is it any wonder that these people are sensitive to warmongering? Is it strange that they can regard no crime more heinous than deliberate incitation to war?

Yet, in our own land, George H. Earle, former pinball ambassador to Bulgaria and former governor of Pennsylvania, can publicly urge that an atomic bomb be dropped on Moscow. And he is not rebuked by the press, nor reprimanded by those in the seats of power.

Instead, rebuke and reprimand is reserved only for those who advocate peace, who propose that friendship with Soviet Russia is preferable to an atomic war, the consequences of which no one can foresee with certainty.

Thinking Back

Of the 30 years the Soviet Republic has been in existence, there were only three brief years when, under the stress of war, the hand of friendship was extended. In that brief interlude, the possibility of cooperation was demonstrated, but its promise was not pursued.

Think back upon the years. From 1917 to 1933, not even the civility of diplomatic recognition was extended. In the years immediately following the revolution American troops invaded Soviet soil, American dollars financed the 14 armies that threw themselves at the young Soviet republics.

After that, U.S. diplomacy was the tacit accomplice of the economic boycott of Soviet Russia, and later of that ill-conceived plan that rebuilt Germany and created the monster of Hitlerism as a bulwark against Russia.

Only with the entrance of President Roosevelt into the White House on March 6, 1933, was there the beginning of an attempt to find the basis for friendly coexistence with the Soviet Union. This overture was met more than half-way.

And during the war, when American blood and Russian blood was mingling on the battlefields of Europe, the first timid overtures blossomed into something akin to friendship.

What has happened?

What has happened since then? What has happened since all Americans thrilled to the heroic saga of Stalingrad?

Some say the Russians have changed since then, have shown their "true colors." But the historic record belies that claim.

The change has come in our own country. A great President, who sought to build an edifice of peace on the only sure foundation, Soviet-American friendship, has died. In his stead has come a small politician from Missouri who has hearkened to the same voices that dominated American foreign policy from 1920 to 1933.

The Roosevelt tradition and the Roosevelt dream of peace have been betrayed and buried in Washington. Instead, the Hoover tradition has returned, and Herbert Hoover himself helps shape the bi-partisan foreign policy.

This is not only a betrayal of a man, of a tradition; of a political promise inherent in the platform upon which he sought and won election in 1944.

It is a betrayal of the American people.

The Russia-haters are America-haters, for they are willing to gamble with the lives of millions of American boys to gratify their own hates and prejudices.

The popular catch phrases like "cold war," "containment," "get tough"—each of them has as its premise a continued and growing antagonism. Each of them, despite the reassurances of columnists and diplomats, can find its end logic only in war—in the transition from "cold war" to "hot war," from "containment" to "encirclement" and to the military concept of the pincer movement.

These concepts cannot form the basis for enduring peace. Only an effort at understanding, cooperation and friendship can provide such a basis.

Essentially, therefore, friendship or enmity with the Soviet Union can be translated into peace or war. That is the choice before the American people, and they can make the wisest choice through the most careful consideration of self-interest.

Sure, William Randolph Hearst hates Russia. But must the spite of this evil old man, and other evil old men, be redeemed with the lives of countless millions of American youths?

EXHIBIT 330

From: *PEOPLE'S WORLD*, Friday, July 15, 1949.

A STATEMENT BY THE EDITORS ON THE BATTLE AGAINST ALL FORMS OF CHAUVINISM

Within the span of little more than a month, the Daily People's World published three stories in its week-end magazine section that contained glaring expressions of white chauvinism and anti-Mexican chauvinism.

This is especially serious for a paper like The Daily People's World which has been, from its inception, in the thick of the battle for the rights of the Negro people and the Mexican-American people, and fights every day against the oppression to which they are subjected.

> "Pedro's Gift" (June 3) offered a stereotyped portrait of a Mexican worker as the irresponsible child of his emotions, a stereotype that has been bred by the attitude of jingo "superiority," fostered by U.S. imperialism, to justify or gloss over its oppression of the Latin-American people here in the United States. The story presented the Mexican worker as a terrorist bomb-thrower, and thereby not only displayed an anti-Mexican attitude, but projected the wrong and provocative suggestion that individual terrorism was a method of class struggle.
>
> "School Days" (June 24) was a story that condoned shamefaced surrender to white chauvinism, presented such surrender in sympathetic terms, and thus encouraged its readers to similar shameful behaviour.

> "Southern Exposure" (July 1) was permeated with the patronizing air of the "superior" U.S. tourist in Mexico, regarding the Mexican people with amused condescension.

Two of the stories ("Pedro's Gift" and "Southern Exposure") were embellished with drawings that were offensive, both reflecting or adding to the harmful content of the written material they illustrated.

The appearance of three such stories in such quick succession, particularly after readers had made proper objections to the first, reveals the need for the most critical self-examination of The Daily People's World staff in general, and the responsibility of the editorial board in particular.

The publication of one such story would be grave in itself, denoting a lack of necessary vigilance. But failure to perceive the insidious nature of the first story, and the further failure to take the necessary corrective measures after the matter had been called to the attention of the editors, and the still further failure to insure the paper against a repetition of similar mistakes, denotes passivity and a reluctance to wage the fight against U.S. chauvinism in general, and the false concept of "white supremacy" in particular.

Such passivity and reluctance, of necessity, reveal that those guilty of it are themselves infected with the virus of chauvinism.

The evidence of this infection was climaxed with the attempt to evade the issue with a routine editorial footnote in the letter column (July 5), casually approving

a letter critical of the story, "School Days." To make matters worse, the critical letter was run together with a letter lauding the story, giving the impression that white chauvinism was a proper subject for pro and con discussion in the columns of the paper.

These overt instances of chauvinism follow other errors, similar in nature, if not as glaring. These follow, too, a period in which the paper gave inadequate political attention to specific aspects of the struggle for Negro rights, most notably evidenced in the slowness with which the campaign for the Trenton Six was undertaken.

All these facts taken together reveal a lack of fundamental understanding of the national question generally and the Negro question specifically, particularly as these questions present themselves in the day-to-day political struggle.

The editors of The Daily People's World are fully aware of the grave nature of these revelations, and take full responsibility for the serious errors committed.

Chauvinism and the especially harmful expression of it, "white superiority," are always deadly to the progressive and working class movement. Such ideas and attitudes create the ideological buttress for the national enslavement of the Negro people, and constitute an indispensable base for the rule of U.S. reaction, and its oppression of white workers, as well as the Negro people. Similarly, such ideas and attitudes help support the oppression of the Mexican-American

people in our own land, and to further the designs of U.S. big business to oppress the peoples of Latin America.

At this particular juncture in history, such ideas and attitudes do harm of even deeper significance. In its designs for world conquest, U. S. imperialism seeks to infest the American people with jingoism, with the Hitler myths of "race superiority," so that the people will develop the frame of mind to butcher other people at Wall Street's command. In furtherance of this same aim, U. S. imperialism seeks to drive deeper the wedges of division among American workers, and the people generally, so as to make them impotent in the face of big business designs for fascism at home, and aggressive war abroad.

The first victims of this shameful ideological warfare have been the Negro people. And this war of ideas has quickly assumed the very material form of lynchings, a Ku Klux Klan revival, mounting judicial persecution and police brutality, as well as increased discrimination in industry.

At such a time, for the editors of a progressive paper to permit, and by inaction, condone, the expression of these poisonous ideas in the columns of the paper they edit is a particularly grave offense against the working class and the progressive movement.

At a time when the paper should take the lead in waging the most effective and uncompromising struggle against every expression of chauvinism and "white

supremacy," thus helping the entire progressive movement to wage a similar struggle, it is particularly grave for the paper to become a vehicle for the very ideas it should combat.

The paper, because its influence is enhanced by its prestige and the tradition it represents, has done incalculable harm in the instances recited above.

We bring these facts and judgments before the readers of The Daily People's World because we are mindful of our ultimate responsibility to them. We are mindful of the fact that their loyalty and devotion has made the existence of the paper possible, and that this loyal devotion is evoked by the conviction that the paper is the uncompromising champion of the interests of the working class, and the liberation of all oppressed peoples.

The Daily People's World has a long and honorable history of battle in behalf of the Negro people, in behalf of the Mexican-American people, and for the unity of the workers of all nations in the common struggle against imperialist oppression and exploitation.

This fine tradition was placed in jeopardy by the series of recent incidents and the chauvinist passivity of the editors that made these incidents possible. More, this same chauvinist passivity not only jeopardized the influence of the paper, but did damage to the progressive movement it serves.

Drawing the necessary and serious conclusions from all the foregoing, the editors of The Daily People's World pledge--

1. To carry through a most searching, and most critical examination of their own work, and the operation of the entire staff with the aim of rooting out every expression and vestige of chauvinism, taking what political and organizational measures are needed to realize this aim. We view this process not as a temporary effort, but the beginning of a continuing struggle to insure that the paper fulfills its mission in this respect.

2. To heighten, in the columns of the paper, the battle for Negro rights on every front, as well as the battle against every form of special oppression to which the Mexican-American people are subjected.

3. To conduct a systematic campaign in the columns of the paper against the ideas of chauvinism and "white supremacy," laying bare their roots in the system of national oppression, and exposing their harmful consequences, not only to the peoples directly oppressed, but the working class in its entirety.

4. To wage a tireless campaign for the unity of all workers, Negro and white, and the members of other minority groups, as the essential bulwark of the great and growing camp of peace and democracy.

With the assistance of our readers, and the organizations that have given such steadfast and splendid support to the paper, we are confident these measures will be carried through, and The Daily People's World will thereby gain in strength and influence, and will fulfill its mission as the powerful,

voice of an ever growing progressive and labor movement on the Pacific Coast.

SIGNED BY THE EDITORS: Al Richmond, Adam Lapin and George Lohr.

EXHIBIT 191

STRIKE STRUGGLES—SOME KEY CONCLUSIONS

Even prior to U. S. intervention in Korea, strikes in California, as in the rest of the country, increasingly assumed the character of rank and file struggles. Since the beginning of the Korean war, this tendency has become more marked and there is every reason to believe that in the future it will be even more pronounced.

The reason is simple. The top officials of AFL and CIO, guided by a class collaboration outlook, have never had much stomach for initiating and leading strike movements. But when they entered into their compact with big business to support the bi-partisan policy of imperialist aggression, they in practice, if not formally, gave a "no-strike" pledge. At the recent state AFL convention, this pledge was virtually formalized when the reigning bureaucracy defeated any move to place the convention on record against a "no-strike" pledge. In the CIO Auto Workers the "no-strike" pledge takes the concrete form of a five-year no-strike contract, and there are reports that a similar contract is being planned for the steel union by Philip Murray and the Steel Trust.

Two immediate conclusions can be drawn from this state of affairs:

* To a greater degree than ever before, if we wish to influence the course of strike movements, we must orient our policy on reaching the rank and file, and effecting the united front from below.

* To a greater degree than ever before, every strike becomes a battle not only against the employer, but against the sellout bureaucracy in the labor movement.

Certainly these conclusions are confirmed by the experience in the Los Angeles painters strike this spring, the informal strike of Los Angeles carpenters in midsummer, the wage movement among San Francisco Bay Area Carpenters culminating in a one-day strike at about the same time, in a series of work stoppages at the Columbia Steel mill at Pittsburg, and more recently, in the highly significant strikes at the Lincoln-Mercury and Columbia Steel plants in Los Angeles.

In the circumstances of today, the most fatal error is an underestimation of the readiness and capacity of the rank and file to fight. This error was manifested most graphically among the left progressives and Communists in the San Francisco Bay Area carpenters' wage movement. An underestimation of the rank and file means, in practice, the acceptance of the "no-strike" pledge, and the abandonment of any effective struggle to defend and advance the workers' economic interests.

Once the skepticism about the rank and file was broken down among the Carpenter progressives in the

San Francisco area, a movement was developed, but because of the initial passivity the rank and file movement never attained its potential strength, and demands that could have been won went by the board in the final settlement.

In all the instances cited above, the official machinery of the unions is in the hands of the right wing. However, a policy oriented on the rank and file is essential to any successful economic struggle in the left-led unions, as well. This is confirmed by the experience among the electrical workers in Alameda county, and the wage movement among the warehousemen there.

Threatened by raids, and operating in the face of the anti-strike pressure generated by the employers and the official top labor leadership, the left-led unions can win substantial gains only through maximum mobilization of the rank and file.

Because of the immense and critical problems our party and our working class face, it is more important than ever to point up the political conclusions that emerge from every strike struggle. The manner in which these conclusions are drawn, their specific character will, naturally, depend on the concrete circumstances in each struggle.

However, a general orientation can be indicated, and certain general principles can be laid down. Among these are:

* Each strike is objectively a revolt against the "no-strike" policy favored by the top officialdom. It should be used as an object lesson to expose that

policy, and its class collaboration base. The point should be driven home that the labor officialdom has entered into the present phase of its abject class collaboration for the political purpose of creating an aura of class harmony, of so-called national unity which big business seeks as the political basis for its aggression abroad.

* In each strike, the elementary, yet profoundly important class point should be made as to who is the enemy, that the enemy of the worker is not some Korean peasant or Chinese worker, but the capitalist, particularly the big monopoly section of capital that sets the tone and lays down policy for its entire class.

There are two cardinal lines of a class approach, which, if developed skillfully and concretely, will serve to relate the economic struggles to the overriding political issues of the day, particularly the central issue of peace, and which will, incidentally, make for a more effective conduct of the economic struggles as such, bringing maximum gains to the workers.

—Al Richmond.

the conspiracy. The record is virtually silent on what occurred at these meetings. Can we simply assume that something occurred which demonstrates petitioners' adherence to force and violence? Is this the type of reasoning upon which criminal charges involving restrictions upon the freedoms guaranteed by the First Amendment are to be sustained?

At page 111 respondent claims that the Communist Party exercised discipline over persons working on the *Daily People's World*. The references to the record show that one person who was on the paper *resigned;* another person was refused registration in the Communist Party for a certain period of time, subject to reconsideration in about a year; and a third person was removed as editor of the paper, this being in the year 1936, a date prior to the time when Richmond and Connelly were even associated with the paper. However, whatever the discipline, and the record shows very little, it was not manifested in any way while Richmond and Connelly were on the paper which would tend to show that they were connected with the alleged conspiracy.

In essence, respondent's "argument" consists entirely of conclusionary statements unsupported by any reasoning. The whole argument might have been more briefly stated as follows: Petitioners Richmond and Connelly just *must* have been part of the conspiracy. After all, so the argument goes, they were Communists, and we all know that the goal of the Communist Party is violent overthrow of the Government. Of course, the record shows that there were

disagreements within the Communist Party; common sense and legal precedent compel the conclusion that "Marxism-Leninism", like any philosophy, means different things to different people (Brief for Petitioners Richmond and Connelly, pp. 82-91), but we can overlook these minor matters. Petitioners just must have been conspirators.

III.

CONCLUSION.

It is respectfully submitted that there is nothing in respondent's brief which presents even a challenge to the analysis contained in our opening brief. The method of argument employed by respondent parallels the manner in which respondent stated the facts: You take a piece of testimony, make an inference from it, report the inference as fact—other equally tenable inferences are put to one side; then you take another piece of testimony and repeat the process in respect to it; then another, and another; finally you put together all such inferences and claim you have built a house of guilt. We do not think the structure can withstand the winds of reason which have ever been the life breath of freedom.

Dated, October 1, 1956.

Respectfully submitted,

AUGUSTIN DONOVAN,

Attorney for Petitioners.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 8

AL RICHMOND and PHILIP MARSHALL CONNELLY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONERS.

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Subject Index

	Page
I. Fact and fancy	2
II. Respondent's "argument"	7
III. Conclusion	11

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OCTOBER TERM, 1956

No. 8

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Petitioners,

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REPLY BRIEF FOR PETITIONERS.

In the Brief for the United States filed herein there are four pages in the Statement of the case devoted to alleged facts concerning petitioners Al Richmond and Philip Marshall Connelly (Brief for United States, pp. 65-69). The argument section contains approximately six pages dealing with the sufficiency of the evidence to sustain the charges against petitioners (*Id.* at 109-115).

We believe that close scrutiny of those pages shows that both the factual presentation and the argumenta-

tion are highly fallacious. This reply brief is directed at those fallacies.

I.

FACT AND FANCY.

Before considering the statement of facts in respondent's brief, we wish to take note of the charge that our Statement "is far from adequate," that there are "errors of omission," and that "much" of our Statement is "devoted to charges and insinuations that the testimony of the Government's witnesses . . . was in large part either consciously false or the product of faulty memory" (*Id.* at 104). Such a charge is most serious. The duty of presenting the facts to this Court in a fair and accurate fashion is not to be lightly regarded. We think, however, that examination of the two briefs and a comparison of them with the transcript in this case will demonstrate quite conclusively that the neglect in this respect rests with respondent.

Our factual presentation contains not one insinuation concerning the falsity of the Government's witnesses, though in our opinion there is much upon which such a claim might be founded. On page 10 of our brief we do point out what is at best an instance of faulty memory: The witness Lautner testified that petitioner Richmond attended the 1945 Communist Political Association-Communist Party convention; Richmond's army discharge papers, we

note, show that he was not even in the United States during this convention.

As to "errors of omission," every bit of testimony concerning petitioner which is to be found in respondent's brief also appears in ours. There are *allegations* in respondent's brief which we did not include. The reason for this, however—and this brings us to respondent's errors—is that those allegations are not reports of the testimony contained in the record but rather respondent's unfounded conclusions and inferences from the testimony. Our brief contains the testimony. Respondent's brief contains statements of conclusions, conclusions which in our opinion are mere speculations.

Thus on page 66 of respondent's brief we find this statement:

> "From September 1946 to June 1948 (A. 363, 364, 367-368), he [Richmond] was one of those whom witness Van Dorn used to take by elevator to the Party's seventh-floor San Francisco headquarters on meeting-nights of the California State and San Francisco County Boards. See *supra*, pp. 14-15."

The references which are contained in the above passage do not support the allegations of fact contained in the passage. Those references are to testimony which establish only these facts: the witness Van Dorn was asked by petitioner Schneiderman to run the elevator in the evening so that State Board meetings might be held; petitioner Yates made the same request so that County Board meetings could be held; Van Dorn complied; petitioner Richmond

took the elevator to the seventh floor on numerous evenings during the period of years that Van Dorn ran the elevator subsequent to, but not necessarily *pursuant* to, the requests of Schneiderman and Yates. Apparently respondent believes that since Board meetings occurred on *some* evenings, and since Richmond went to the seventh floor on *some* evenings, it is fair to state as a fact that Richmond attended the Board meetings, or at least to so insinuate.

In so stating the facts respondent completely neglects to mention the witness Van Dorn's testimony that two other persons asked her to run the elevator in the evening so that they might be able to go to Communist headquarters on the seventh floor (R. 7779). So far as the record shows, neither of these requests for elevator service was connected with the Board meetings. In addition, Van Dorn testified that she had received lists of the names of persons who were to attend the meetings; she named persons on those lists (R. 7793-96). Petitioner Richmond was not named. But respondent conveniently ignores these matters. Respondent ignores the innumerable possible reasons for which Richmond might have gone to Communist headquarters. But this is typical of the entire pattern of the case against petitioners. Only by drawing inference after inference, piling one atop the other, and ignoring the many conflicting and at least equally tenable inferences, was it ever possible to consider the testimony adduced at trial as evidence against petitioners.

An even more glaring gloss on the record appears at page 69 of respondent's brief:

> "From the fall of 1945 to June 1948 (A. 364, 374), Connelly was one of the group of individuals whom witness Van Dorn used to take by elevator to the Party's seventh-floor San Francisco headquarters, after checking their names from the check list supplied her, on meeting-nights of the California and San Francisco County Boards. See *supra*, pp. 14-15."

The portions of the record which respondent cites in the passage above, and which presumably contain testimony substantiating that passage, are completely devoid of such substantiation. The testimony does not show that Connelly's name was on the list in question. The testimony does not show that Connelly rode the elevator on meeting nights in question. The testimony does not even show that Connelly rode the elevator in the evening. The one and only fact which is contained in the testimony is that Connelly rode the elevator on about half a dozen occasions. How is it that respondent concludes that he rode in the evening rather than during the day? How is it that respondent concludes he was on the elevator on the meeting nights? How has respondent divined that Connelly's name was on the list referred to?

How, indeed, could respondent present to the Court such a statement of "facts" and then unabashedly make the claim that petitioners' presentation was inadequate!

Another noteworthy point in respondent's summary of the evidence occurs on page 67 of its brief. Respondent notes that in the article *Use the Press As a Key Political Weapon* (Ex. 186, p. 7, R. 1533), petitioner Richmond referred to the Communist Party's "vanguard role." The following footnote appears after the phrase "vanguard role":

> "*I.e.*; its role of leader of the proletariat in the planned revolutionary seizure of power. See *supra*, pp. 12, 44 (fn. 52), and Appendix A, *infra*, p. 158."

It seems to appear that there are three authorities to support respondent's interpretation of "vanguard role": pages 12 and 158 of the brief and footnote 52. Examination of this footnote 52, however, shows that it does nothing more than cite to pages 12 and 158. Such is the way in which authorities are multiplied. Most important, however, the contents of pages 12 and 158 in no way show that Richmond's use of the phrase "vanguard role" implied violent overthrow of Government. If one reads Richmond's article, reproduced in its entirety in Appendix B of our brief, it becomes clear that his concept of a "vanguard role" relates to the organization of large numbers of people in campaigns to influence legislation through the free expression of opinion.

Page 110 of respondent's brief contains a plain misstatement of the record. In discussing the *Daily People's World*, respondent says:

> "Its 'articles * * * reflected the attitude and the policy of the Communist Party on the various

subjects of which they spoke'; '[o]therwise, they wouldn't have been printed' (A. 18)." .

The testimony which respondent is quoting is that of the witness Saunders. Examination of this testimony shows that Saunders was speaking about the *Western Worker,* not the *Daily People's World.* Yet respondent quotes this testimony as if the witness had been speaking about the *Daily People's World.* Respondent does this in the face of testimony that the columns of the *Daily People's World* were open to non-communist writers and that articles were published which did not reflect Communist Party views (R. 11,322).

Such is the statement of the facts. Respondent's argument relies on these supposed facts. Upon this basis respondent attempts to build a structure of inferences. This argument is as unconvincing as the factual presentation is inaccurate.

II.

RESPONDENT'S "ARGUMENT".

In arguing this case in our brief we attempted to consider every bit of testimony contained in the record concerning petitioners Richmond and Connelly. Each bit of testimony was analyzed to see what possible inferences might be drawn therefrom. It was our conclusion that there is no evidence which even remotely connects petitioners with the alleged conspiracy.

We think that respondent's argument as to the sufficiency of the evidence concerning petitioners constitutes the best possible demonstration of the validity of our contentions. Nowhere has respondent even attempted to show how the testimony contained in the record points clearly and convincingly to the conclusions necessary to sustain the case against petitioners.

The argument begins on page 109 of respondent's brief. That page is devoted simply to saying that editorship of a newspaper does not insulate petitioners from the herein prosecution. We have never claimed any such insulation. We do claim that editorship does not constitute proof of participation in the alleged conspiracy.

On page 110 respondent states: "Petitioners Richmond and Connelly were definitely proved to be members of the conspiracy." Why? By what evidence? In the pages which follow respondent recites the evidence showing that petitioners were editors of the *Daily People's World* and that this newspaper was sponsored by the Communist Party; then respondent notes the evidence concerning Communist Party support of the newspaper; and finally there are various statements concerning newspapers, none of which is shown to have been known to either Richmond or Connelly. All this occurs in the space of approximately four to five pages. More than twenty pages in our brief are taken up with a detailed examination of this very same evidence (Brief for Petitioners Richmond and Connelly, pp. 60-82). We believe that it is there demonstrated that the testimony concerning

petitioners' editorship of the *Daily People's World* wholly fails to show their connection with the supposed conspiracy. The vital element of proof which is completely missing is evidence to prove that *petitioners' purpose* in working on the newspaper was in any way related to the purpose of the alleged conspiracy. Absent such proof, the evidence establishes only that petitioners worked on the paper.

As to the newspaper, itself, respondent concedes that it never contained a word of advocacy of violent revolution (Brief for United States, p. 112). But this, says respondent, is unimportant. The purpose of the paper, respondent tells us, was to gain the "sympathy of the masses," and, *of course*, such sympathy was sought "to facilitate the Party's task of forcible seizure of power" (*Ibid.*) It may be that *someone* thought of the paper in this way, but just what evidence proves that Richmond and Connelly published with such a purpose is not stated. But then evidence is not really necessary. It should be self-evident that people who publish a newspaper which is concerned with issues of the day, elections, legislation and so forth were *really* seeking to foment violent revolution.

Respondent asserts that petitioners attended meetings of the California State and San Francisco County Boards of the Communist Party. This assertion, as shown earlier in this reply brief, is merely respondent's speculation. However, even if true, what does such attendance prove? There is no evidence to show that the meetings in question were connected with

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IN THE

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No. 310.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIN SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY, PHILIP MARSHAL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Motion for Leave to File Brief Amici Curiae on Petition for Return of Certiorari and Brief.

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SUBJECT INDEX

	PAGE
Motion for Leave to File Brief Amici Curiae on Petition for Return of Certiorari	1
Brief of Amici Curiae on Petition for Return of Certiorari	3
Appendix. Alphabetical List of Petitioners	App. p. 1

TABLE OF AUTHORITIES CITED

STATUTE	PAGE
United States Constitution, First Amendment	2, 4

TEXTBOOK

Commager, Henry Steele, Freedom, Loyalty, Dissent (1954)	5

NEWSPAPER

New York Times, August 22, 1955, Hutchins, Report of the Fund for the Republic (1st Report, 1955)	3, 4
New York Times, August 25, 1955, Address of Chief Justice Warren Before the American Bar Association	6

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVIS STACK, FRANK EFROIN SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY, PHILIP MARSHAL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Motion for Leave to File Brief Amici Curiae on Petition for Return of Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners,* all residents of the State of California and members of the Southern California-Arizona Conference of the Methodist Church, respectfully request leave to file the accompanying brief *Amici Curiae* on the petition for return of Certiorari now pending in the above-entitled cause.

*Names are set forth alphabetically in Appendix.

As citizens, we are deeply and profoundly concerned with the impact which the enforcement of the Smith Act, the first peace-time sedition statute in the United States, has had on the exercise of those fundamental freedoms upon which the security of the Nation depend.

As ministers, we have a special and direct interest in the rights guaranteed by the First Amendment of our Constitution. Any encroachment of the basic freedoms affects the freedom of religion which we believe is fundamental to the welfare of our Country and in which we are so vitally concerned.

We recognize the Court rule that permission to file such a brief should be requested from the Solicitor General of the United States. However, because of the lack of time to do this, and being familiar with the Solicitor General's interpretation of "the nature of the . . . interest" of the group requesting consent,* we are presenting this motion for leave to file our brief.

Wherefore, it is respectfully requested that this Honorable Court grant this motion to file the annexed brief as *Amici Curiae.*

CHARLES J. KATZ,
403 West Eighth Street,
Los Angeles 14, California,
Attorney.

ANTHONY V. RANDLES,
Of Counsel.

October 5, 1955.

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*Letter from Simon E. Sobeloff, Solicitor General, to Royal W. France, dated August 25, 1955.

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIN SPECTOR, WILLIAM SCHNEIDERMAN, AL RICHMOND, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALY CONNELLY, PHILIP MARSHAL CONNELLY and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Brief of Amici Curiae on Petition for Return of Certiorari.

The Smith Act has been one of the principal causes for the alarming flouting of civil liberties in the United States, and has engendered an atmosphere conducive to misunderstanding, indifference and violation of basic rights which has "tended to suppress conscientious non-conformity."* Since the statute is of indefinite duration,

*Hutchins, Report of the Fund for the Republic (1st Report, 1955) New York Times, August 22, 1955.

and since the Courts below appear to have extended the construction and application of the Act to lengths not heretofore countenanced by this Court, it would appear that review by this Court has become essential if prosecutions under the law are not to become so vagrant and at large as to substitute the arbitrary decisions of officialdom for the orderly exercise of constitutional powers. The dangers which lurk in the formal pronouncements of the Courts below, eliminating as they do all First Amendment considerations from Smith Act prosecutions, are too great to be disregarded by this Court.

The questions raised herein are of paramount national importance. Dr. Robert Hutchins, President of the Fund for the Republic, after noting the recent drastic departures "from those which have characterized Anglo-American jurisprudence," states:

> "America would be unrecognizable without freedom of speech, freedom of the press, freedom of religion, freedom of association and the freedom to differ; without due process of law and the equal protection of the laws; without the conviction that all men are created equal and are entitled to equality of opportunity."
>
> New York Times, August 22, 1955.

If America would be unrecognizable without the unfettered enjoyment of the freedoms guaranteed by the Constitution, even less so would its democratic institutions be understandable to the peoples of the world. In this area of relaxed international tensions, when an attempt is being made in a peaceful world atmosphere to foster a

true appreciation of American ideals, it would be anomalous and harmful for this Court to place its stamp of approval upon unconstitutional encroachments in the area of human rights.

> "It is correct to say that a people like ourselves with our traditions, our history, our habits, our attitudes, our institutions of democracy and freedom, our general enlightenment, must have freedom if we are to survive . . . Our responsibility here is immense. Upon us rests, to a large degree, the future of Western civilization and of Western Christendom. If we falter here, if by silencing inquiry and criticism we fall into serious error, the whole of civilization as we know it may go down with us. We must use all our resources and use them wisely. And of all our resources, the richest are in the minds and spirits of free men. These we must not fritter away."
>
> Henry Steele Commager, *Freedom, Loyalty, Dissent* (1954),

The importance of preserving intact our constitutional freedoms was recently emphasized in the address of Chief Justice Warren before the American Bar Association:

> "We, and other free countries, are endeavoring to demonstrate that freedom and dignity for all constitute the only sound basis for world peace.
>
> "In such a gigantic struggle, where the eyes of a critical world are constantly upon everyone, the power of example is far more forceful than that of precept.
>
> "If the world is made to see that the provisions of our Constitution guaranteeing human rights are

living things, enjoyed by all Americans, and enforceable in our courts everywhere, it will do much to turn the tide in our favor and therefore toward peace."

New York Times, August 25, 1955.

In the spirit of all the aforesaid, your petitioners respectfully petition this Court to review the convictions here "with the scrupulous care demanded by our Constitution."

Respectfully submitted,

CHARLES J. KATZ,
Attorney for Amici Curiae.

ANTHONY V. RANDLES,
Of Counsel.

APPENDIX.

Rev. Howard R. Carey
Emmanuel Methodist Church
Altadena, California

Rev. J. Maxwell Chamberlin
First Methodist Church
El Monte, California

Rev. Frank Crane
University Church
Los Angeles, California

Rev. Kenneth L. Danskin
First Methodist Church
Rosemead, California

Rev. G. Byron Deshler
Spurgeon Memorial Methodist Church
Santa Ana, California

Rev. Owen M. Geer
First Methodist Church
Long Beach, California

Dr. Gerald B. Harvey
Executive Secretary
Board of Education
Southern California-Arizona Conf.

Rev. Earl W. Isbell
Alondra Park Community Church
Los Angeles, California

Rev. Paul G. Jochinke
Puente Community Church
Puente, California

Rev. Arthur F. Kent
Wilmington-Avalon Methodist Church
Wilmington, California

Rev. Robert James Kersey
La Crescenta Valley Methodist Church
Montrose, California

Rev. Archie Matson
Broadway Methodist Church
Glendale, California

Rev. John Mixon
Executive Secretary
All Nations Foundation
Los Angeles, California

Rev. Edward N. Peck
Rosewood Methodist Church
Los Angeles, California

Rev. George E. Root
First Methodist Church
Ventura, California

Rev. Roger W. Sawyer
First Methodist Church of El Segundo
El Segundo, California

Rev. John R. Shaffer
University Methodist Church
Los Angeles, California

Rev. John L. Taylor
Torrance Methodist Church
Torrance, California

Rev. Norman W. Taylor
First Methodist Church
South Gate, California

Rev. Frank B. Toothaker
First Methodist Church
Redlands, California

Rev. Harlan Waite
Lincoln Avenue Methodist Church
Pasadena, California

Dr. George A. Warner
Retired Superintendent
Los Angeles District
Southern California-Arizona Conf.
Los Angeles, California

Rev. Kenneth Watson
Tujunga Community Methodist Church
Tujunga, California

Rev. L. L. White
Holman Methodist Church
Los Angeles, California